Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-851

SAMUEL G. ALBERT, M. D., and
FRED G. ALBERT, D. P. M.,

Petitioners,

V.

FIRST NATIONAL BANK AND TRUST
COMPANY OF MARQUETTE, MICHIGAN,
EXECUTOR OF THE ESTATE OF
GEORGE ALBERT, DECEASED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

SAMUEL G. ALBERT, M.D.
FRED G. ALBERT, D.P.M.
In Pro Per
Albert Building
105 Suffolk Street
Ironwood, Michigan

Petitioners

Pro se

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

Petitioners respectfully pray that a Writ of Certiorari issue to review the Order of Denial of Petitioner's Application for Leave to Appeal entered on July 8, 1976.

and Order of Denial of Petitioners' Motion for Reconsideration of the Order entered on July 8, 1976, which latter Order was entered on September 9, 1976. Further, Petitioners pray that said Writ encompass by review the Order Denying Petitioners' Application for Rehearing of the Court of Appeals entered on the 20th day of January, 1976, applied for on an Opinion of the Court of Appeals entered on December 10, 1975, affirming the Order Denying Motion for New Trial on Judgment of the Circuit Court for the County of Gogebic affirming the Probate Court opinion entered on March 16, 1972.

OPINIONS BELOW

The Opinions and Orders and Judgments are appended as provided for the the Supreme Court of the United States (Revised) Rules

(23.1 (1), Orders of the Supreme Court are without Opinion. The Opinion dated, December 10, 1975 of the Court of Appeals for the State of Michigan is reported in the Official Reports of 66 Mich. App. 252, and is set forth in the Appended Orders and Opinions.

JURISDICTION

This Court's jurisdiction is invoked under and by virtue of Title 28 United States Code, Sec. 1257 (3) and by virtue Title 28 United States Code, Sec. 2101(c); Title 28 United States Code, Sec. 1651; Title 28 United States Code, Sec. 2104 and Article III of the United States Constitution.

QUESTIONS PRESENTED

1. Whether the Petitioners in the light of a consideration of all of the

proceedings were denied procedural and substantive due process and equal protection and their privileges and immunities?

2. Whether the charged denial of due process and other rights in the Lower Courts when same are noticed but unheard yet are determinative of the issues is cognizable and reviewable by the United States Supreme Court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title 28 United States Code Secs. 1257(3), 1651, 2101 and 2104 and Article III, Fifth and Fourteenth Amendment to the United States Constitution are set forth in Appendix B hereto.

STATEMENT

The Petitioners are sons of George

Albert, Deceased, who was a resident of the City of Ironwood, County of Gogebic, State of Michigan, for many years prior to his death on November 24, 1970. He was survived by five other sons and three daughters.

Petitioner, Samuel G. Albert, M. D., is a physician and surgeon engaged in a general medical practice in the City of Ironwood and surrounding area except that because of his testing of the validity of the regulations governing the rights of his patients and himself as a medical practitioner in the county hospital and his defense against his false arrest under false charges filed against him and petitioner's 13 Million Dollar damage suit against those individuals, including public officials, medical men and attorneys, deemed involved has caused Petitioner to be bar-

red since 1961, from the practice of his profession in the said county hospital and every other hospital in the orbit of his practice. The controversy has caused petitioner to be the recipient of the ire and unwarranted hatred evidenced particularly through public officials, judges, attorneys and local news media. Throughout all of the controversy and during his last illness, Petitioner had the total support of his father, George Albert, deceased.

The controversy and the constant insistence by the deceased that the entire family fight the imposed injustice, the blatant conspiracy, and the attention and concern especially expressed toward the welfare and future of petitioner, Samuel G. Albert, M. D., caused the family to become divided upon the issue. George Albert was a man of means and considerable good

reputation who spent considerable time attempting to convince those opposing Petitioner rights as a practitioner of a recognized school of medicine of their wrongful conduct and their discrimination against his son, Dr. Samuel G. Albert, who he favored and doted upon and as being closest to him because of his plight and his misfortune, George Albert read and reread all transcripts relating to the litigation involving the barring of his son, Samuel, and urged his sons and daughters to confederate to fight what he deemed to be a reflection on him and his cherished family. Since 1943, George Albert obtained all of his medical care and treatment from Dr. S. G. Albert, except on the occasion of referral to specialists when same was required. This was upon the insistence of the deceased. The only exception to this

constant and continuous medical care when needed is the period of approximately one year prior to 1969, and three days in the year 1970 caused by family differences about where and whom should care for George Albert. The family was divided as to where George Albert should receive his care. George Albert, although irked by the demands of his divided family concerns, wanted to be treated and cared for by petitioner, S. G. Albert, M. D. and solely by him and as to the place where he would be cared for - he had no objections if it were in the home of petitioner, S. G. Albert. George Albert wanted to live and to get well and he was happy and comfortable in the home he visited most among his children

Petitioner, Fred G. Albert, also a son of George Albert, is a Doctor of

Podiatry Medicine, residing and practicing in Austin, Minnesota.

After a year of non-care, on or about December 22, 1969, at the request and insistence of his father, George Albert, Petitioner, Samuel G. Albert, resumed the medical care of his aged and ailing father with an insistence that Petitioner, Samuel G. Albert, bill and be paid for all services, treatment, drugs, and all facilities. Because of the complexity of his father's physical ailments and with his consent, Samuel G. Albert, moved his father into his own home in order to enable him to maintain the constant, twenty-four hour a day care that his father required and to avoid the growing and pervading interference and harassment of the other members of the family.

George Albert, during his illness, appointed his son, Petitioner, Fred G. Albert, as his Attorney-in-Fact, by virtue of a Power of Attorney, on October 21, 1970.

Petitioner, Fred G. Albert, immediately began administering his father's financial affairs on October 21, 1970. On November 12, 1970, the original Power of Attorney granted to Petitioner, Fred G. Albert, was revoked and a new Power of Attorney, providing Petitioner, Fred G. Albert, more specific powers as Attorney-in-Fact. This new Power of Attorney was executed by George Albert on November 14, 1970.

During the period from October 21, 1970 to November 14, 1970, negotiations took

place between George Albert and his son, Petitioner, Samuel G. Albert, concerning extension of a loan from George Albert to Samuel G. Albert. On November 14, 1970, this loan transaction was consummated by the execution of a promissory note by Petitioner, Samuel G. Albert, as follows:

> "November 14, 1970, Ten years after date, for value received, the undersigned promises to pay to the order of Mr. George Albert, thirty-five thousand dollars ($35,000.09).. with no added interest chargs.
>
> Signed: /s/ S. G. Albert, M.D.
> Date: November 14, 1970"

"This loan is made through the undersigned acting as Power of Attorney for Mr. George Albert with his full knowledge and at his specific request. Funds to cover this loan are to be made available through the sale of certain securities and supplemented by cash if necessary as agreed to by Mr. George Albert on this November 14, 1970.

Signed: /s/ Fred G. Albert, D.P.M.
Dated: 11/14/70"

Thereafter, between November 14, 1970 and November 23, 1970, Petitioner, Fred G. Albert, pursuant to the direction of George Albert, ordered the brokerage firm of Piper, Jaffray and Hopwood of Minneapolis, Minnesota, to sell certain securities owned by George Albert, to provide the cash for the loan to Petitioner, Samuel G. Albert. Some of these securities were jointly held with other children of George Albert. One joint tenant, John Albert, endorsed those securities upon which his name appeared as joint tenant. The other joint tenant, LaMese Davis, had previously executed a blank stock power which Petitioner, Fred G. Albert used to effectuate the sale.

During the morning of November 24, 1970, Fred G. Albert executed a check in the amount of $35,000.00 payable to "Dr. S. G. Albert" payable from the Power

of Attorney Account of George Albert at the Austin State Bank of Austin, Minnesota. Petitioner, Fred G. Albert signed the check "George Albert, by Fred G. Albert, P.A." He then mailed the check to Petitioner, Samuel G. Albert, with a note asking him not to cash the check until the proceeds of the sale of stock had been received and he had advised Petitioner, Samuel G. Albert, that there were no sufficient funds to cover the check.

On November 24, 1970, George Albert suddenly passed away.

The sale of the securities, which took place on November 23 and November 24, 1970 realized $32,537.39 in proceeds. To this, Petitioner, Fred G. Albert, added $1,600.00 of his own funds and on or about December 21, 1970, deposited these monies

in the account of George Albert over which he was Power of Attorney, at the Austin State Bank. Concurrent with receipt by Fred Albert of the proceeds of the sale of the securities, Petitioner, Samuel G. Albert, sent the check for $35,000.00 to Petitioner, Fred G. Albert, endorsed as follows:

> "/s/ S. G. Albert, M. D.
> For Deposit Only in
> Northwestern State Bank,
> Austin, Minn."

Petitioner, Fred Albert, deposited the check with the Northwestern State Bank in Austin, Minn., as requested by Petitioner, Samuel G. Albert. The proceeds of that deposit of $35,000.00 was used to pay off a loan Petitioner, Samuel G. Albert, had with that bank.

Thereafter, Probate proceedings were

instituted in the Probate Court for Gogebic County, Michigan and the Respondent was appointed Administrator with Will annexed. Without necessary and contemplated and Court promised order, Respondent instituted suit in the Gogebic Circuit Court against the Petitioners. Respondent alleged in its complaint that Petitioners, Samuel G. Albert and Fred G. Albert were guilty of conversion, fraudulent misconduct, and exerting undue influence and duress over George Albert in order to obtain the $35,000.00 for their own personal gain and benefit. Respondent, further alleged, that Petitioner, Fred G. Albert, breached his fiduciary relationship and acted beyond the scope of his authority. Respondent finally contended that George Albert was mentally incompetent and therefore the Power of Attorney to Fred G. Albert was void. Petitioners unequivocally denied

each count of Respondent's complaint.

Trial was held on March 4, 1974, before the Honorable William F. Hood, Judge by appointment to the Thirty-Second Judicial Circuit of Michigan. Judge Hood entered his Findings of Fact and Conclusions of Law on August 15, 1974. (Appendix A)

The Circuit Court revised the note agreement and arrangements made between Petitioners and George Albert, deceased. Said Court determined that the contractual promissory note and the money paid thereon was a gift and determined a conversion. There was no finding that Petitioner, Samuel G. Albert, made any wrongful appropriation of any money.

The Circuit Court gave judgment to Respondent in the amount of $33,400.00, plus interest at 5% from December 21, 1970

to May 10, 1972, in the amount of $2,310.54 for a total of $35,710.54, plus costs. On August 28, 1974, a judgment was entered for $35,710.54 against Petitioners plus 6% interest from May 10, 1972.

Thereafter, the Petitioners filed their Motion for New Trial alleging substantial errors of fact were made by the trier of fact and that the decision of said trier of fact was against the great weight of all the evidence before the trier of fact. The Petitioners further argued that the agreement between Petitioner, Samuel G. Albert, and George Albert, was in fact and law, a loan for adequate consideration and not a gift as determined by the Court. The Court denied Petitioners Motion for New Trial after oral argument was held on October 25, 1974. The proceedings entailing appeal obtained denials from which petitioners beseech a Writ of Certiorari.

REASONS FOR GRANTING WRIT

I

PETITIONERS IMMUNITIES, RIGHTS AND PRIVILEGES AND EQUAL PROTECTION IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY PROTECTED AGAINST ARBITRARY STATE ACTION AS IS PROCEDURALLY AND SUBSTANTIVELY OFFERED BY THE FOURTEENTH AMENDMENT HAVE BEEN VIOLATED AND DENIED TO PETITIONERS WITHOUT DUE PROCESS OF LAW.

A.

NO JUDGMENT OF A COURT AFFORDS DUE PROCESS OF LAW IF RENDERED WITHOUT JURISDICTION.

This Petition interjects the issue of jurisdiction. It is applied on the basis that original Circuit Court jurisdiction was lacking. Lacking such jurisdiction, Respondent lacked the requisite authority to institute the suit taken against Petitioners, and the Circuit Court lacked

the necessary jurisdiciton to entertain the cause. Necessarily, all orders and judgments emanating from a Court lacking requisite jurisdiction are judgments and orders which have no force and effect. Such judgments and/or orders are nullities. Without using much cited authority, objections to lack of jurisdiction can be made at any stage of the proceedings. Case authority, cited later, indicates that a court of record can speak only through its orders and judgments and never through its opinions, conversations, or other means. There must be a judgment or order from which the parties may make an appeal as of right or leave be it interlocitory or otherwise. In the instant matter, the Probate Court on February 1st and February 18, 1972, by verbal instructions,

directed the Appellee to institute suit against Appellants. No order of the Probate Court was filed or entered on said statement.

This Court, it appears, and the State Courts, contend they are constantly sensitive to the known and projected image of the judiciary and the learned profession who practice before and in the Courts of the State. This Court will find record evidence of judgment by prejudice. This case, if ultimately reviewed, will evidence misdoings, misconduct, and such bias and prejudice as to Petitioners as to clearly violate Petitioners' due process rights.

The principle, namely, that the due process clause requires a fair and unbiased tribunal has more than "at random" application.

This Court will find the Petitioners' Motions for Disqualification of the Hon. Michael DeFant, although duly filed, were not heard or considered. Evident bias of the Probate Court will be shown wherein the Probate Judge admits he discussed the merits with the previously presiding Judge; further, that said Judge became personally embroiled, in and out of the Courtroom; that a reading of the transcript shows positively of his predisposition; his intervening and leading questions designed, as it appears, to make a case against Petitioners; his choosing to ask of the least knowledgeable of the witnesses questions that are not likewise asked of Petitioner's witnesses; the interjection by said judge of his personal opinions relative to medical practice; to classify without foundation a condition as being "ter-

minal" or that a certain individual was a "captive" and more horrendous classifying prior to court adjudication or the necessity for same that the conduct of Petitioners was "tainted" or involved a "bit of fraud."

This Court will find interesting, if not incongruous, that the complaint in the Circuit Court against Petitioners charges several counts sounding in tort. The Probate Court lacks the power to authorize or direct the Respondent (executor) to sue an heir or heirs for the benefit of other heirs. Moreover, the "conversion count" was but one of several charges all of which the Probate Court could not direct, authorize (or even order, if it had done so) the Respondent to institute proceedings. The Court cannot extend its statutory or constitutional powers by judicial fiat. Stoll v. Gottlieb, 59 S. Ct. 134

B.

THE CIRCUIT COURT LACKED THE NECESSARY JURISDICTIONAL REQUISITES TO ENTERTAIN SUIT INSTITUTED WITHOUT JUDGMENT OR ORDER BY THE PROBATE COURT.

The Respondent sought an Order of the Court relative to its proceedings against Petitioners. It must be noted that Respondant, as Executor, was not in the exercise of any authority, statutorily derived. The record clearly shows that Respondent would abide by the "direction" of the Court. The heirs, including Petitioners, were entitled to an Order from which any one or more of them could appeal from. On the record, the Respondent has stated that it instituted suit based solely on the "direction" of Hon. Michael DeFant, Probate Judge, as appears, only, from the transcript of the Probate proceedings, dated February 1, 1972, and as adjourned to February 16, 17,

and 18, 1972.

C.

THE PROBATE COURT IN ASSUMING TO DIRECT RESPONDENT TO INSTITUTE SUIT AGAINST APPELLANTS DID SO WITHOUT STATUTORY AUTHORITY AND THIS SAME IS A NULLITY BECAUSE OF LACK OF JURISDICTION.

This failure to stay within the confines of statutory conferred authority constituted in this case an abetting of waste. Acting without jurisdiction or authority the lower courts have permitted and provided by "direction" the Respondent to engage in lengthy and costly litigation. The plan seems to be that the estate can be dissipated; the Respondent and its attorney pecuniarily benefitted under the now evident waste (beyond recall) unless the Petitioners concede that they will waive "truth" to extricate the Respondent and attorney from their created dilemna.

Respondent apparently contends that Petitioners are beyond the reach or entitlement to due process. Respondent has argued that if Petitoners persist there will be waste. The lower courts appear to hold the same view. Time and time again, one of the less favored heirs pointed out, that the only statutory provided procedure for allegations of the nature charged against Petitioners was Compiled Laws Supp. 1956, Sec. 705.5; MSA 27.3178(385):

> "If any fiduciary, heir, legatee, creditor or any other person interested in the estate of any decedent or ward shall complain to the judge of probate on oath that any person is suspected to have concealed, embezzled, conveyed away, or disposed of any money, goods or chattels of the decedent or ward, or that such person has possession or knowledge of any deeds, conveyances, bonds, contracts, or other writings, which contain evidence of or tend to disclose the right, title, interest or claim of the decedent or ward to any of the real or personal estate or any claim or demand of the decedent or ward, or any Last Will and

> Testament of the decedent, the said judge may cite such suspected person to appear before said Court, and there submit to examination upon oath upon the matter of such complaint."

The Probate Judge and Respondent, heeding the complaints of other favored heirs, chose not to use the Statute provided, or even use the statute in aid of authorization to sue. The terms of the statute encompasses the charge of "conversion." Of course, this outlined statutory procedure would be too determinative of issue and provides no source of augmenting to continuing increase a Respondent's and attorney's fees. Prolonged litigation enriches only the executor and its attorney. Interestingly, the Respondent has never contended that the protests, the appeals or the procedures used by Petitioners are frivolous or vexations. It also appears

that Respondent is serving the interests and demands of some heirs Respondent obviously favors against the interest of Petitioners who are also heirs. Under these circumstances, such costs and expenses of litigation are being charged against the estate, but any such argument and objections go unheeded.

There is still pending and at issue in Gogebic County Circuit Court in the Matter of Theodore G. Albert, heir and interested party in the Estate of George Albert, Plaintiff v. First National Bank and Trust, et al, Defendants, being File No. 73-36, a Complaint for Writ of Superintending Control, attempting to enjoin Respondent and Petitioners wherein the plaintiff, Theodore G. Albert, relevantly alleged, among other allegations, as follows:

"7. That defendant BANK deliberately or negligently as the trustee for the heirs, including defendants ALBERT, awaited a Probate Court order allowing claims before it instituted litigation on May 8, 1972 on the promissory note transaction against defendants ALBERT, the matter in issue in said Circuit Court File No. 72-38.

"8. That said George Albert passed away on the 24th day of November, 1970, his will was not admitted to probate until March 31, 1971 and an executor was not appointed until September 8, 1971, from and after which time defendant BANK undertook its duties as such, and thereafter said defendant BANK was cognizant of the promissory note issue.

"9. That defendant BANK did in fact petition the Probate Court of Gogebic County for instructions on November 23, 1971 on the question of whether or not the promissory note in question was an asset of the estate and if so should defendant BANK litigate same.

"10. That it does not appear from the records of the Probate Court that defendant BANK was ever instructed or ordered to litigate the issues found in Circuit Court File No. 72-38.

"11. That no heir, legatee, creditor or any other interested person with respect to said estate had made complaint to the Judge of Probate with respect to the allegations found in Circuit Court File No. 72-38.

"12. That at all times pertinent hereto, since September 8, 1971, defendant, BANK, COULD without additional or unnecessary cost and expense to the estate and continuing delay in the disposition of the Probate of the estate have proceeded in the Probate Court, as provided under Compiled Laws Supp. 1956, Sec. 707.5; MSA 27.3178 (385) rather than by filing a costly and time consuming lawsuit in the Circuit Court being File No. 72-38.

"13. That regardless of the reason or the excuse, the fact of delay, without cause assesable to plaintiff, the other heirs including defendants ALBERT has been imposed, and same is evidenced by the unnecessary, costly determination that the depositions of defendants ALBERT must be undertaken in excess of one year after the institution of the alleged cause of action; all of which conduct, as to this plaintiff, and others interested including defendants ALBERT amounts to devastavit and incumbent and thus further delay in time and additional unnecessary legal expense and other pecuniary loss to the plaintiff

and other beneficiaries under the will.

The Circuit Court has failed to entertain the cause filed and it remains noticed for hearing without disposition.

The record indicates, with respect to amicable settlement, that the Court and Respondent stated they would respect and adhere to the wishes of the majority of the heirs. By affidavits, it was indicated by a Court filing, that a majority were in agreement. Respondent and the Court instead of adhering as it is shown by the testimony of LaMese (Albert) Davies, is unrefuted that Respondent's counsel became infuriated, went into a tirade, became very critical of the affidavits and attempted to solicit a vote to maintain proceedings; he stated that all of the Alberts were a little bit "kooky."

The Probate Court's alleged direction

or alleged authorization to Respondent to institute suit against Petitioners is absolutely void. In the Lower Courts, Petitioners tried, in vain, to show: The practice and powers of said Court are prescribed by statute and any attempted action in violation thereof is a nullity because of lack of jurisdiction. The lack of jurisdiction cannot be corrected. There being no jurisdiction the Courts acts and proceedings could be of no force or validity. The Probate Court has no inherent powers and derives none of its jurisdiction or powers from the common law, but possesses only such jurisdiction and powers as are prescribed by the Constitution or by statutes. Brinkeroff-Faris Trust & Savings v. Hill, Mo. 50 S. Ct. 451, Certiorari denied 50 S. Ct. 86. There is no statutory provision creating a power in the probate judge to

suggest or direct the institution of the proceedings culminating in Petitioners' instant Petition. A judicial power cannot be delegated since, in any event, the Court speaks only through its written orders. Petitioners, aware of the necessity of an order, cited the above case law and noted that:

> Probate Code Rule 917 provided as follows:
>
> "All orders and decrees of the Probate Court shall be in writing, typewritten or printed, and signed by the judge. Such orders after being recorded shall be placed in the Court files."

An order to be effective should be reduced to writing and be dated and signed by a judge. In this matter, the Probate Judge attempts to speak through his verbal determination noted in the conclusion of the transcript of the proceedings, now a part of the record dated February 16, 17, 18, 1972. The Probate Court lacked any such

statutory authority. McNary v. City of Taylor, 1972, 41 Mich. App. 556, 200 NW 2d 772, Hosner v. Brown 1972, 40 Mich. App. 515, 199 NW2d 295. Hosner, on page 531 cites Honegman & Hawkins as follows: (Cited by Petitioners below).

> "The term 'order' includes every official direction of the Court requiring action to be taken in a case, except, of course, those orders given orally in open court in directing the trial, conduct of witnesses, exclusion of evidence, etc. ***But otherwise, every order of the court must be dated and signed by the judge." 3 Honigman & Hawkins, supra, P. 7.

> "Though slightly stricter than former practice,the purpose of the rule is to assure that every judgment and order substantially affecting the rights of the parties shall be recorded in precise and authoritative form" 3 Honigman & Hawkins, supra, p. 8.

> "Sub-rule 522.1 provides a flexible machinery for the mechanics of getting the judgment or order into final form and having it signed. The judge may dictate the form of order and direct it to be prepared and presented for his signature either by the clerk or by the prevailing party. More typically, the

> judge will announce his judgment or order or dictate or file an opinion stating his decision and direct the prevailing party to prepare the form of judgment or order and present it to the judge for his signature upon notice to the other side." 3 Honigman & Hawkins, supra, p 8.

The proposition that the court speaks through its written orders, not through its verbal decisions is indicated by Hartman v. Roberts-Walby Enterprises, Inc., 380 Mich. 105, (1968) futilely cited in the lower courts.

Judge DeFant intended that his directive be an Order. The record indicates that he outlines a procedure to be followed. It cannot be considered as other than a dictate or command.

> Taken from Pages 26 and 27, File No. 18700, February 1, 1971.

"THE COURT: I don't think there's any question about that, and I'm not going to enter any formal order today, but I may as well state how I feel.

I feel that I should instruct the fiduciary to bring -- take action for the recovery, or to take action to protect -- I'm not saying to recover-- to protect the interests of the estate in these securities and in the promissory note which now, apparently, reflects the proceeds. Now . . . .

". . . All I'm doing today is determining what instructions I can give the fiduciary. I'm not determining the respective rights. There is no determination of anyone's rights with respect to securities or the promissory note -- just the question of authorizing the fiduciary. Now, I have a responsibility to see that the administration of this estate progresses in an orderly fashion without undue delays, and I am not very well satisfied with the progress that has been made.

The following statements of the Judge of Probate indicate that he had pre-adjudicated fraud and undue influence as if to leave Respondent only the procedure and mechanics to be performed to corroborate

his determination. The record does not indicate that the Court before authorizing proceedings had remained fair and unbiased on the issue.

Proof by analogy to MCLA Sec. 702.60 - 702.61 indicates that the law provides in the case of a "special administrator" he must have an "Order" before commencing and maintaining an action.

"But it is not always clear that there is a deficiency in assets. When, in doubt; it would seem that application to the Probate Court resulting in an Order directing such suit would be a sufficient basis to justify such litigation."

Vainly and futilely, Petitioners cited Wright v. Brown, 317 Mich. 501, 27 NW 2d 97. Litigation requires an order when initiated by a special administrator.

In the Circuit Court, the Honorable William F. Hood, Circuit Court Judge, page 4 of Transcript of Non-Jury Trial improper-

ly reasoned as follows:

> "The Probate Judge did, according to the record that has been stipulated into evidence, here, stated on the record in the Probate proceedings that this action was authorized and if authorization is required, this was sufficient and the signing of an order to that effect would be purely a ministerial act." (Underlining that of writer for emphasis).

This Court can find from this baseless statement some indication of the Court's bent when stating that an Order was not required. Even the Petitioners know that a "Ministerial act" is one in which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to the exercise of his own judgment upon the propriety of the action being done. Here, the contrary is most evident.

The Circuit Judge is in error on this issue of law. That Judge DeFant recognized

that an Order should emanate from his deliberations is made clear on Page 26 of proceedings in Probate Court, dated February 1, 1972.

"THE COURT: All right. Well, I feel this is an asset of the estate.

"MR. BORDEAU: That's right.

"THE COURT: I don't think there's any question about that, and I am not going to enter any formal order today. I feel that I should instruct the fiduciary to bring -- take action for the recorvery, or to take action to protect. I am not saying to recover -- to protect the interests of the estate in these securities and in the promissory note which now, apparently, reflects the proceeds." (Underlining that of writer.)"

Lastly and most conclusively with respect to the matter of direction without Order, please note the comments of Judge DeFant, at the adjourned hearing on claims, P. 504 of Transcript of Hearing on February

18, 1972:

"...that I am going to grant, to the Administrator, the authority to institute suit to challenge this entire transaction to the extent of the interest of the Estate, which is that portion of those securities which -- or the value thereof, or the interest thereof--"

"And, therefore, I'm authorizing the Estate of pursue it. I'm also authorizing the Estate to bring in any other parties they may think necessary to resolve all of the issues. There's some things here that I -- for example, I -- the respective interest of LaMese, although she has really disclaimed -- But standing in the wings here is John. He can't just walk in, I -- I -- I -- Assuming he's made a valid disclaimer - assuming that he is the -- that if the stock had not been sold, he would have been the sole survivor -- he has to take some steps at this stage -- I don't know what steps he's got to --

"MR. BORDEAU: Well, I --

"THE COURT: And, maybe, if he doesn't take any steps, it may be incumbent on the Administrator to join him, --

"MR. BORDEAU: Well, --

"THE COURT: -- and to get this thing resolved.

"MR. BORDEAU: There will -- They -- As far as I'm concerned, if John wants to pursue his statement -- that he has an interest in that note, then he will have to take necessary legal action, on his own behalf, to protect his interest in that, but --

"THE COURT: All right.

"MR. BORDEAU: -- We will continue the inventory.

"THE COURT: Do you want to draft an Order on that?

"MR. BORDEAU: I -- I do.

"THE COURT: All right."
(Underlining that of Petitioners).

The Court expected Bordeau to draft an Order pursuant to his instructions. No such Order was ever entered. Because of the lack of an existing order, the Court as to the instructed litigation, did not act judicially through an Order as, by law, is required.

Jurisdiction of the subject matter of a judicial proceeding is an absolute requirement and it either exists or does not

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exist. It cannot be conferred by consent, conduct, or waiver, or by the conduct of the litigants.

The conduct of the Respondent could not confer jurisdiction upon the Probate Court or subsequently the Circuit Court.

A Court speaks through its orders. More particularly stated, a Court speaks through its written orders, not through its verbal decisions. This proposition requires no citation of authority.

Jurisdiction is confined to appeals from judgments or orders. MCLA 600.308, MSA 27A308. (Re: Ct. of Appeals). (Cited futilely by Petitioners below).

An order to be effective, should be reduced to writing and be dated and signed by the judge. 1 Callaghan's Mich. Pleadings and Practice (2d Edition) 19.29, p. 618.

D.

THE PETITIONERS BY VIRTUE OF THE DUE PROCESS CLAUSE WERE ENTITLED TO, BUT DID NOT OBTAIN, A FAIR AND UNBIASED TRIBUNAL.

The Petitioners cannot help but believe that at least, a one time impartial and fair review by Certiorari of the record could but result in one conclusion, and that is that the bias and prejudice of Judge Michael DeFant is strikingly and horrendously evident from the record. It has spilled over all of the remaining record of the proceedings secured. Respondent received favorable, but costly, disposition of matters. This has barred and foreclosed any possible fair review beyond his mere dictum. Petitioners did not know or otherwise have the opportunity to know Judge DeFant prior to his assignment, a situation unlike that of Respondent and its counsel, living and conducting business in the Marquette and environs. Nevertheless, said Judge DeFant brought with him to the Courtroom, and more

importantly, to the record, his hostility and his prejudice toward Petitioners all unwarranted. In fact, it (the prejudice) reared its ugly and unwanted head prior to any formal proceeding. Petitioner, Dr. Samuel G. Albert, talking on the record on February 1, 1972, at a hearing on claims, revealed that Michael DeFant did, while engaging in a telephone conversation, assess to Petitioners a "dissipation" of the estate. The conversation had as its main concern, the question of whether or not Andrew Wisti was qualified to act on behalf of Appellants.

The record shows some of the following evidence of the predisposition, hostility, bias, prejudice, and personal embroilment of said Judge DeFant.:

Transcript, February 1, 1972
Probate Hearing on Claims

"MR. SAMUEL ALBERT: When I told you Mr. Wisti was told by you that, 'You cannot represent me', you were very surprised. And I want to add --

"THE COURT: Oh, now, come on. Don't put words in my mouth.

"MR. SAMUEL ALBERT: I think this is important for the record, because I want it on the transcript for my --

"THE COURT: Now, you be careful, young Mr., you just be careful, because I may hold you in contempt of Court. Now, you better be careful.

"MR. SAMUEL ALBERT: I will tell you exactly what I heard. I want it on the record. You said I should have known better -- to be able to have an attorney. I told you I did have an attorney, and you still assumed I didn't have an attorney. I should have had plenty of time to get an attorney. I told you I had a short time. You said that I must appear whether I have counsel or not.

"THE COURT: That's right.

"MR. SAMUEL ALBERT: You also stated that for such a large bill, that it would dissipate the estate. I feel a statement like that was prejudging before a hearing.

"THE COURT: There was no such statement made, now.

"MR. SAMUEL ALBERT: There was another talk with

"THE COURT: You are --

"MR. SAMUEL ALBERT: you on the telephone, and this is exactly what you told

me, your honor.

"THE COURT: That's all. He's made a statement.

"MR. SAMUEL ALBERT: I take an oath that this is the truth."

Although Petitioners' motion to disqualify was filed and, however, inartistically worded, no action contemplated by Petitioners, or the rules was ever given to it. It remains on file and is unnoticed as Petitioners preponderating evidence.

The United States Supreme Court need only to refer to the Transcript of the Probate Court proceedings of February 1, 1972 and the adjourned hearings on February 16, 17, and 18, 1972, to find proof that Judge DeFant was, in effect, testifying against Petitioners. If one would apply the standards of Judicial Canon 15, Judge DeFant's intervention was obviously not intended to promote expedition and prevent unnecessary

waste of time. It was obvious, when taking over the examination of witnesses, that his mode and manner of participation and the leading questions of witnesses hostile to Petitioners, tended not to aid but to prevent the proper presentation of the cause, or the ascertainment of the truth.

The Court, as the record shows, deliberately avoided the leading questions to the Petitioners and their witnesses that the Probate Court and Respondent kept proposing to hostile, uninformed witnesses, Dr. James Albert and Katherine Richards.

Examples of the leading questions asked of the hostile, unqualified witnesses, by the Probate Court:

On Pages 458 and 460:

"Could George Albert be easily pressured to do things?"

"Was it due to the fact that he was so aged, so sick that he didn't have the power to resist the people?"

Again on Page 462:

"Was Dr. Sam dictatorial and arbitrary?"

"Was George Albert afraid of Dr. Sam?"

On Page 425:

"How did you get the information?" (Court does not get an answer from witness and then says it is satisfied that; it could come to a conclusion about George Albert's capacity to understand.)

On Page 424, Line 2:

"That in his condition, physical and mental, that he was - subject to being easily influenced?"

On Page 442:

"Was there a discussion among all the family as to how bad George Albert was?"

"Would you say it was a general feeling in 1969 (Dec.) among all the family that your father was very aged, very sick man, and that he was on a terminal illness?"

"If asked a question in negative, would he answer in negative; if asked in positive would he answer in the positive?"

The following are examples of questions not asked of Petitioners by the Court or Respondent's Counsel, but were asked of Katherine Richards: (Wholly unqualified as a nurses aide to give expert medical testimony and one who was not present during the crucial time frame).

Page 406:

"Did George Albert ever want to go to Sam's home?"

"What was your relationship with Dr. Albert?"

"Did they ever hear from you about George Albert's fear of Dr. Albert?"

"Was George Albert terminal?"

"Could George Albert make decisions?"

"Was he a captive?"

"Was he senile?"

"Was he free to get other doctors?"

"Did George Albert improve or go downhill under Dr. Sam's care?"

Pages 439, 440, 407:

"What were George Albert's desires about going to the hospital?"

(Instead he asked Petitioners why wasn't the decedent place in the hospital. The Court did not ask Petitioners if decedent desired to go into the hospital, as he did with John Albert and Katherine Richards).

Note: Court never described or commented about Petitioners' witnesses, but stated that Respondent's witnesses were "vague" (Page 413), that "he is confused." (Pages 419 and 444), "very little to offer." (Page 465) "let's stop right there" - this man has confused me," (Page 434) and on Page 419 "I'm confused." Page 425: Can't tell whether this is something he is repeating or said or observations he has made." Yet, the Probate Judge made his determination on their testimony! The testimony of petitioners was unrefuted.

Page 442: "I don't know how proper my question was."

One of the legal principles, Petitioners may be naively and futilely assuming, is that principle that Petitioners are under the 14th Amendment entitled to equal protection and equal treatment under the law and that the Constitution protects them from any deprivation without due process of law.

The due process clause requires a fair and unbiased tribunal. The United States Constitution, Amendment 14, pertinently provides:

> "No person * * * shall be deprived of life, liberty, or property, without due process of law * * * "

This was intended to exact from the States observance of basic liberties.

In the case of Re Muchison, 349 U. S. 133, 136, 99 L. Ed. 942, 946, the United States Supreme Court relevantly stated (emphasis supplied):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that every procedure which would offer a possible temptation to the average man, as a judge . . . not to hold the balance nice, clear and

true between the State and the accused, denies the latter due process of law. Tumey v. Ohio 273 US 510, 532, 7 L ed 749, 758, 47 S Ct 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.

But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 US 11, 99 L ed. 11, 75 S Ct. 11."

The Murchison Case involved the validity of Michigan contempt proceedings. The due process clause applies equally to civil as well as to criminal cases. While this is obvious, for the clause itself contains no exception, we refer the court to the decision of this Court in Small Co. v. Refining Co. 267 U.S. 233, 239, a civil case, in which it said of its earlier decisions in United States V. Cohen Grocery Co., 255 U.S. 31 (14 ALR 1045), and Weeds v. United States, 255 U.S. 109, both criminal cases:

"The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions."

We direct the court's attention to the following quotations from Payne v. Lee (Minn.), 24 NW 259, 262, and 263:

"A concept of judicial administration which leads one to assume that justice can be obtained 'completely and without denial' before a tribunal that is partial, biased, or hostile is certainly one alien to our institutions. If we were to assume that complete justice could with any likelihood be so dispensed, it would be a justice which commanded neither the respect nor the confidence of the citizen."

A prejudgment by a tribunal is a deprivation of due process, Fuentes v. Shevin, 92 S. Ct. 1783 (1972). Prejudice, bias, or other form of disposition on part of trier of fact (as here) results in a denial of due process. Crawford v. Bounds, CA, N.C. 1968, 395 F. 2d 297, vacated on other grounds, 89 S. Ct. 234. The very contention that

Petitioners have been making about bias of the Court raises the question of violation of Constitutional right to "due process" guaranteed by the 14th Amendment. It should require no necessity for argument to contend that due process will not permit judicial determination prior to the close of evidence.

Our judicial system should constantly condemn arbitrary findings as offensive to due process, Near v. Minnesota, 283 U.S. 697, or arbitrary deprivation of liberty.

> "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, the minimal requirements of the clause (due process) must be met." Goss v. Lopez, 95 S. Ct. 729 (1975).

With respect to the Lower Court:

Hon. William Hood, Circuit Judge, notes in his comment on Motion for New Trial, that he required of Petitioners when applying to offer newly discovered evidence that because it was not technically contained in writing in a certain form, that Petitioners were foreclosed from having the Circuit Court consider same on the Motion for new trial. Found in transcript of Proceedings before said Judge on Motion for New Trial, dated October 25, 1974, pages 17 and 18.

It was not necessary for Petitioners to have matter of new evidence included in the formal motion under GCR 110.2(1).

In a case where the testimony is ultimately construed as being "sharply conflicting," it would appear that the ends of justice are not met by denying Petitioners an opportunity to produce newly discovered evidence. Justice cannot, under the circumstances be relegated to a technical ruling that says "it would have to be shown

that such additional testimony would quite clearly change the result of the trial," and how can that be done without the production of the new evidence. It would seem that justice would have been better served if the court sua-sponte called for an offer of proof. The arbitrary ruling of Judge Hood, considering the history of events, and all circumstances entailed, is offensive to the due process rights of Petitioners.

E.

ALL OF THE PROPER PARTIES IN INTEREST WERE NOT BEFORE THE CIRCUIT COURT OR OTHERWISE JOINED TO AFFORD FULL AND COMPLETE HEARINGS AS REQUIRED BY DUE PROCESS.

The Probate Court in its proceeding, the Circuit Court in its proceedings, and subsequently the Court of Appeals in the

case designated as JOHN G. ALBERT vs. HON. WILLIAM HOOD, et al., being Court of Appeals File No. 21215, were made aware as is true as to Respondent that JOHN G. ALBERT and LaMESE DAVIES had such interests in the subject matter that their presence in the action was essential to render complete relief. The Respondent had initial and constant notice of the interests of JOHN and LaMESE, as evidenced by several proceedings.

The Probate and Circuit Court's paid no heed except that the Probate Court instructed Respondent to join all interested parties. The Respondent made choices among instruction and did not abide by all the instructions. The Circuit Court considered such instructions as having no merit. The Court of Appeals, without opinion and after much delay, dismissed the Complaint for Superintending Control filed by JOHN G. Albert.

The dictates and verbiage of GCR 205 (necessary Joinder of Parties) might be persuasive as they are mandatory.

F.

A VOID JUDGMENT - ABSOLUTELY NO CONVERSION TOOK PLACE

We are constrained to believe that if any reviewing court was aware, or was made aware of, the noted, sworn testimony of the Respondent, said court, including this Court must conclude as follows:

(a) That the transaction complained of is of no different kind than that consummated with the other heirs and in the same customary, ordinary, method of doing business as was usual with deceased.

(b) That the Respondent while he should be interested in preserving the entire estate is doting on the transaction made by Petitions, Samuel G. Albert, M.D., while flaunting a disregard of the other loans.

(c) That no conversion exists or is chargeable. In fact, the transaction has not caused a loss to the estate. That all Respondent is attempting to do

is to accelerate the payment on a note inventoried as an asset. A promise of payment at a fixed time is not conversion.

(d) That if said loan was made as other loans, as admitted by Petitioners and as would not be out of character for George Albert to make, no undue influence or fraud is involved.

The full impact of Respondent's testimony is persuasive. Thus, we beg the Court's indulgence by including a portion in this Petition. What can be more persuasive, more compelling to cause inquiry and review by grant of Certiorari than to be able to quote the testimony of the complainant, respondent, who when questioned at the "heart issues" testifies in such a way as to wipe out, virtually erase, each count of Respondent's original complaint and thus fail in the burden of proof. Such testimony contradicting the charges in Respondent's circuit court complaint leaves the Court with a duty to determine that the Respondent did not, in

fact, carry its burden as a plaintiff in the civil action from which the appeals and this Petition have been taken and that the Counts alleged were not proved against Petitioners by the competent evidence.

The transcript of the Circuit Court proceedings of March 4, 1974 when reviewed on Certiorari will prove through the testimony of the Respondent that no conversion took place and that other heirs were treated in a different fashion. The Respondent by Mr. Herlich, testified, in part,:

"Q. Mr. Hurlick, would this indicate anything to you, that all of the loans that George Albert made to his children were then interest free?

"A. It is possible.

"Q. This is what it indicates?

"A. Yes.

"Q. And therefore the particular loan that was made at this time and that was made just prior to Mr. Albert's death, was in keeping with his customary, ordinary method of doing business with his family?

"A. It's possible.

"Q. Well, likely, isn't it, sir?

"A. Well, we will say likely.

"Q. Yes. So, this would not be out of character for George Albert to make an interest free loan?

"A. No.

"Q. From all the indications you have seen?

"A. Right.

"Q. As administrator of this estate?

"A. Right.

"Q. These loans that Mike and Jim have presently existing with the estate, Mr. Hurlick, what are the terms of those for repayments?

"A. There are no terms on them.

"Q. So, it was not uncommon then for Mr. George Albert to make loans without taking a note?"

"A. Right.

"Q. And therefore, Mr. Hurlick, it would not be uncommon, would it have been, for Mr. George Albert to make a loan to his son, Samuel Albert, and take a note without interest?

"A. It's possible.

"Q. Likely?

"A. Likely.

"Q. Thank you, sir."

With reference to promissory notes of favored heirs, the Respondent testified:

"Q. Yes, but were they of sufficient vintage, in other words, there wasn't any fraud or conspiracy charged against Jim or Mike for the sale or taking of these notes without interest or security?

"A. No.

"Q. Do you have your records with you, Mr. Hurlick?

"A. Yes.

"Q. Could you take a little time and examine the dates of those other notes?

"A. Right.

"Q. Would you do that please?

(Whereupon the witness left the witness stand and returned to the stand at 2:23 P.M. with records).

"A. We don't have any notes.

II

THE CHARGED DENIAL OF DUE PROCESS,

AND OTHER RIGHTS IN THE LOWER COURTS, WHEN SAME ARE NOTICED BUT UNHEARD, YET ARE DETERMINATIVE OF THE ISSUES ARE COGNIZABLE AND REVIEWABLE BY THIS COURT.

The federal question and issue of due process was raised in the Probate Court, the Court of Appeals and in the Supreme Court of Michigan. The Petitioners raised the issue in open court (Probate and Circuit) in appeal by briefs, except that on appeal to the Court of Appeals the attorney for Petitioners against the will and command of Petitioners refused to raise the issue. Petitioners, however, have ever since in the Court of Appeals and in the Supreme Court of Michigan, interposed the question.

Prior to the judgment reflected in the opinion of the Court of Appeals, the Petitioners alleged, cited and briefed the matters re: Due Process, as herein, referred to.

The federal question was timely and properly raised, the Courts, below, were made cognizant of the federal issue.

The federal question of due process though raised by Petitioners was not passed upon by the lower and appellate courts of the State of Michigan.

If the lower courts had entertained and considered the due process claims and issues according to Constitutional and Statutory law, a different and more favorable result would have certainly been derived. The determination of the matters of jurisdiction, hearings upon competent evidence, a full and complete hearing, equal treatment, equal protection, fair and unbiased tribunal, and other privileges and immunities were crucially involved. When not considered and blatantly avoided, Petitioners require the issuance of aWrit of Certiorari

for ultimate and deserving justice.

Petitioners claim that at no stage of the proceedings sought to be reviewed, was there a determination of the sufficiency of the evidence to support the findings.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should review the Judgment and Opinion of the Michigan Court of Appeals and the Orders of the Michigan Supreme Court denying appeal therefrom.

MAY IT PLEASE THE COURT:

Petitioners have in their possession a copy of the 1970 Changes in the Supreme Court Rules by Bennett Boskey and Eugene Gressman, cited as 90 S. Ct. 2337, at p. 2341. We are shocked to be advised of the " well known fact that year after year approximately 90% or more of the petitions

for Certiorari are denied..." We have since learned that the percentage of denials may be higher. We cannot speak for the merit of any other submitted petition, but we have long awaited a truly unbiased review by an unbiased and more revered tribunal. We have always contended that ultimately your Honorable Court will make a complete and full review. To this end, we beseech your favorable disposition of our Petition by grant of a Writ of Certiorari. Hopefully, our efforts to have meaningful application of the Constitutional safeguards will be accorded your most respected, serious consideration. Your Honorable Court will write the last chapter to a prolonged and tedious repetition of denials. If we are denied and our denial becomes merely augmentation of the 90% or more,

then Petitioners have a right to declare -- "There is no justice."

Respectfully submitted,

SAMUEL G. ALBERT, M.D.

FRED G. ALBERT, D.P.M.

Petitioners, in Pro Per
Albert Building
105 Suffolk Street
Ironwood, Michigan 49938
(906) 932-3406

APPENDIX-A

STATE OF MICHIGAN

THE PROBATE COURT FOR THE COUNTY OF GOGEBIC

In the Matter of the Estate of *
*
GEORGE ALBERT, *
*
Deceased. *

OPINION RE CLAIMS

Objections were filed to two of the claims filed in the above estate. They are the claims of Dr. Samuel G. Albert and Dr. Fred G. Albert in the amount of $47,006.75 and $2,190.48 respectively.

Dr. Samuel G. Albert is a general medical practioner with offices in Ironwood, Michigan. He was a son and residuary beneficiary of the decedent. His claim is for medical services alleged to have been provided decedent, and for drugs, medical supplies and for a private room alleged to have been furnished the decedent, the latter in the home of the claimant. The total claim for all charges amounted to $73,882.80, covering the period from December 22, 1969 to the date of death of the decedent on November 24, 1970. It is admitted that the amount of $26,876.12 was paid in eight amounts from May 15, 1970 to September 11, 1970, leaving a balance of the claim of $47,006.75. The claim is predicated on a claimed express contract acknowledged by the decedent and by his son, John Albert, who was acting as his attorney in fact during this period.

With respect to compensation for services rendered between near relatives, the general

rule appears to be that in the absence of an express contract, services rendered near relatives living in the same household as members of the family are presumed to be gratuitous. 7 ALR 2d 8. This particularly applies for services rendered by a child to a parent. Mason v. Dunbar, 43 Mich. 407. VanDyck Estate 288 Mich. 115.

In re Williams Estate 106 Mich. 490, it was stated with reference to this rule,

> ".....the claimant cannot recover in this case unless the proofs show that there was an express promise to pay for the services, but that the fact may be shown by facts and circumstances which satisfy the jury under the rule that I have given you in regard to the nature of the evidence that should be required, that the services were rendered in the expectation on the part of the claimant that she was to be compensated therefor, and in the expectation on the part of the deceased that she was to pay for them, and that that expectation rested upon an understanding of the parties that there was a legal liability and a legal obligation. I do not understand that it is necessary to find that there was any agreement to pay any specific wages, or any specific amount. If there was an agreement to pay,--if the jury find that there was a promise to pay, then it will be your duty to ascertain the amount from the evidence which the claimant is entitled to receive, and that amount is such sum as her services were reasonably worth." See Mich. citations 7 ALR 2d 49, 50.

Although it appears that services (or personal services) (or domestic services), rendered by one member of a family to another are presumed to be gratuitous, generally the courts do not set up any specific standards for determining just what type of services would be presumed to be gratuitous. Since the family relationship is the dominant consideration in determining the applicability of the presumption, it seems that the most desirable logical view would be that the presumptionwould be applicable only when it is shown that the services were such as members of a family usually and ordinarily rendered to each other. Synder v. Nixon, 188 Iowa 779; Wilson v. Elsee, 2[illegible] Iowa 857.

The view has been taken that the presumption of gratuity is not applicable as to services of an extraordinary nature, or, at least, is overcome upon proof of such services. Kellum v. BrowningsADMR 231 Ky. 308, 21 SW 2d 459. See generally 7 ALR 2d series.

The view has been expressed that to hold that services in managing a 32 room hotel to be gratuitously rendered would be a miscarrage of justice. Kramer's Estate 92 Pittsburgh Legislature 21.

It would appear, and the court would conclude, that the rendering of medical services by a son to a father would be extraordinary and unusual services for which the presumption would not lie.

In re Parker Estate 126 NYS 165, it was held that a daughter who is a practicing physician was entitled for services rendered in assisting in a surgical operation on her mother and where she provided medical care for an extended period of time.

The claimant testifies that at the time he entered into agreement to render the medical services, the understanding was that he was to be paid a $100 a day in addition to compensation for any special services. The son, John Albert, denies that there was an agreement for special services; that his understandingwas that the claimant was to be paid at the rate of a $100 a day. On several occasions, following the submission of his bills, John Albert questioned the amounts.

The decedent at the time of his death was in an advanced age of 82 years and apparently had been failing in health for several years. Prior to the middle of the year 1969, it appears that Samuel Albert had, and from time to time, acted as the decedent's personal physician; that there had developed a controversy between the children of the decedent with respect to the continuation of medical services by Samuel Albert for the decedent.

In December, 1969, it appears that the decedent's physical condition was deteriorating and it was decided to again retain Samuel Albert as personal physician for the decedent. Samuel Albert testified that he agreed on December 22, 1969, to resume rendering medical services only on the condition that he would be paid according to his terms, and furthermore that he was to have complete charge of the decedent without interference on the part of any of the other children.

It is a fair conclusion to state that as December 22, 1969, the physical condition of the decedent was terminal. The list of ailments and physical disabilities of the decedent as described by Samuel Albert can lead to no other conclusion. It can also be a fair conclusion that at this time the decedent was in such an advanced stage of senility with related disabilities from his various ailments that he was, in a large measure, incompetent

to make adequate decisions for himself, and that the agreement was either for the payment of medical services or his acquiescence in the mode of treatment was not an exercise of free choice and the he was in a sense a captive in the situation in which he found himself. He had suffered a stroke, his speech was more or less limited to "yes" and "no", he was not ambulatory and was generally in a very debilated state.

On the basis of the attorney in fact's testimony, we must question any understanding to pay for the special services over and above the $100 a day that was included in the claim. Secondly, there is certainly some question whether an attorney in fact under the circumstances in which the claimant depends on the consent and acquiescence of the decedent, had authority to negotiate such a contract as is claimed by the claimant. Under all the circumstances, we find that, as a matter of law, there was no express complete contract providing for payment of medical services beyond $100 a day. In view of the ambiguity of the alleged agreement, we find that there was no contract, express or implied to pay for the special services and supplies, particularly in view of the relationship of the parties who were certainly not dealing at arm's length with an exercise of free choice. There is certainly no question that the claimant rendered extensive medical services to the decedent and did provide substantially all the other related services set forth in his claim.

It would be a fair appraisal to state that the physical condition of the decedent during the period covered by the claim was such that hospitalization in a hospital was not only the normal alternative but also the best alternative. Why wasn't the decedent placed in the hospital? The claimant states

that no hospital could give him the care that he needed and certainly not the hospitals in the area. On the other hand, the testimony establishes that Dr. Samuel Albert had been barred from having access to hospitals in the area for a number of years. It does appear that one of the hospitals would have admitted the decedent under the care of the claimant, but the claimant refused to accept this opportunity. A fair appraisal would indicate that it was not the welfare of the patient that dictated the claimant's decision but rather his own personal problems and his own conflicts with the hospital authorities in the area. The claimant repeatedly states that he was motivated at all times by his love for his father and his desire to see that he received the best medical care possible; that at all times the welfare of the patient came first.

This does not measure up to the entire factual record. There is certainly in the treatment of the patient and of his other children, grounds to conclude that the claimwent beyond the realm of the area of the doctor-patient relationship and acted in a very arbitrary, dictatorial fashion. The decedent was dying, and, as someone stated, this patient needed tender loving care, and this the patient did not get. Most of his children were barred from having any contact with him. The decedent was isolated and it is obvious that in many instances the motivation of the claimant was not the welfare of the patient but his own problems and his own needs. He claims his filial love was the primary motivation. It is hard to reconcile a claim of filial love with the transaction that the claimant was involved in during the last few days of decedent's life. Decedent was dying and obviously claimant as his physician must have known that and yet he involved himself in a transaction with his brother, Fred Albert, who was then acting under the

color of power of attorney to sell certain securities belonging to decedent jointly with other children. The securities were sold within a day or two of the death of the decedent and the proceeds were given to the claimant as a loan which is reflected by a promissory note payable in ten years without interest.

This transaction raises serious questions as to the legality and good faith of the whole transaction. This transaction raises another question bearing on the good faith of the claimant. At or about the date of death, according to his claim, he was entitled to approximately $47,000. The borrowing of approximately $35,000 from the decedent under all the circumstances is not satisfactorily explained if it is true that at the time the decedent was indebted to him in the amount of$47,000. Not only the good faith of the claimant is at issue also that of his supporting witness, Dr. Fred Albert, who acquiesced in the transaction, who handled the mechanics of the transaction so that a loan could be mde to the claimant which was in turn applied on a promissory note at a bank in Austin, Minnesota, on which both the claimant and the attorney in fact were co-signers..

Let us look at another facet. Dr. Samuel Albert claims that on or about March 7, 1970, he concluded that the decedent could not be adequately treated in his own home and that he could better take care of him if he removed the patient to the doctor's home which he did on March 7, 1970. The patient remained in the claimant's home from March 7, 1970 through May 9, 1970 and from May 13, 1970 through November 24, 1970 the date of death for which he made a charge of $45 a day which came to a total of $11,700. The record clearly establishes that this was not an actual out-of-pocket cost to the claimant but it can be fairly inferred that the charge was predicated on the normal hospital charge in the area. This one aspect alone indicates

that the claimant was not only trying to get payment for his services and out-of-pocket money for his medical supplies but that he was, in fact, trying to make a profit. In most of the other services that he rendered he was assisted by others for which no special claim was made. They are obviously included in his own claim, so that it can be said that the claimant was not actually limiting his charge to his time and his supplies which were out-of-pocket. It indicates another act of over-reaching which is not consistent with his claim that he was at all times motivated by the interest and welfare of his patient. Claimant states that his charges were in measure predicated upon the loss of private practice incident to the care necessary to be rendered to the decedent. Yet his income tax returns indicated that from 1961 to 1968 his gross income varied between $32,000 and $45,000; that his net income ranged between $10,000 and $21,000 during that period. He explains this by stating that he was devoting very little time during this period to private practice and that he was h-ndicapped by the fact that he was barred access to the hospitals. In 1959, he showed an income of $79,000 with a net income of approximately $40,000.

In 1969 his gross medical income was $35,608.81--the net was $16,319.81. In 1970, which presumably includes the $26,876.12 received from the father, his gross income was $65,613.32 with a net income of $42,416.94 which, incidently, is the highest net income for approximately ten years.

We find that we cannot give great weight to the claim of Dr. Samuel Albert that in rendering services to his father that he necessarily suffered a substantial or significent loss of income that he would not have suffered had he not been treating his father.

We cannot accept the claimant's rational that the care in the hospital would be less

adequate than that he provided. It would appear that a hospital where nurses and other employees are constantly on duty, would provide better supervision during night-time hours than the communicating system that claimant had set up where he would depend on hearing the breathing sounds of his father in claimant's bedroom, on the grounds that he would be constantly on the alert to the father's breathing even during the claimant's sleeping hours. We must find that all that he did for his father was not solely motivated by the welfare of the patient;

we find that he was motivated by other factors arising from his own personality, his own problems, and conflicts with his own brothers and sisters.

His chief supporting witness is his brother, Dr. Fred Albert. From the entire testimony we can only conclude that this witness was not entirely unbiased.

The testimony of Dr. James Albert seems to be more objective than the testimony of other witnesses. He states that his father did not want to go to Dr. Samuel Albert's home. He states that his father wanted to to go to a hospital and infers that Dr. Samuel Albert was fearful of the influence the other children might have on the father, particularly, LaMese.

It can be fairly inferred that the efforts of the claimant to isolate the father from his other children was not entirely motivated by medical reasons. We cannot , in good conscience, allow the claim of Dr. Samuel Albert in the amount claimed. It is true that the claimant rendered extensive medical services to his father, undoubtedly far beyond what he would have rendered to a private patient and this must be taken into consideration. Taking all the testimony with all it's

nuances, with all its complexes, with all the motivations, it would be a miscarriage of justice to allow the amount claimed.

Stretching our credulity to its limits, we reluctantly allow the claimant the rate of $100 a day from December 22, 1969, through May 9, 1970, and from May 13,1970, through November 24, 1970, in the amount of $35,000. Against this we will credit the amount of $26,876.12 which reflects the payments actually received. The amount of the total claim hereby disallowed is $40,382.80. The amount allowed and due to the claimant is $6,623.88.

Dr. Fred G. Albert, son and residuary beneficiary of the decedent, who is also a doctor of podiatry, filed a claim against the estate in the amount of $2,190.48, to which the administrator c.t.a., and interested parties, filed objections.

During his father's illness, claimant states that he purchased and furnished for his father certain medical supplies and equipment which are listed in his claim in the total amount of $975.48. There is no satisfactory proofthat these supplies were not in fact furnished, and the Court finds that there is an implied promise to pay same.

However, some of the equipment was kept by the claimant, particularly a hydrotherapy unit which cost $297.50. The Court finds that the amount of $200 should be credited against the claim for this item, reducing the claim for the medical supplies and equipment to $775.48.

Sometime in October of 1970, the claimant, at least under color of title, was appointed by the decedent to be his attorney in fact and apparently acted under this power of attorney until the day of death and even afterwards when it could been legally assumed that the power of attorney had terminated. The claim includes an item of 2600 miles at 15¢ per mile, which is hereby allowed in the amount of $390.00.

During his period as attorney in fact, claimant claims he was away from his practice a total of 5½ days and is entitled to the sum of $150.00 a day which represents his loss from his practice. We cannot allow this item of $825.00 in full for several reasons. One, the measure of his loss from his professional practice is not the measure of his worth as attorney in fact. Two, much of the time that he claims to have expended, was with respect to the highly questionable transaction of the sale of the securities belonging to the decedent jointly with others. The proceeds of which were eventually applied to pay a promissory note in which he was the joint maker with Dr. Samuel G. Albert. In the light of all the circumstances, we feel that an allowance of $25.00 a day is more than ample. Accordingly, this item for services rendered is allowed in the amount of $137.50. It is the finding of the Court that the amount of $887.50 should be disallowed from the amount claimed and the claim of Dr. Fred G. Albert is allowed in the amount of $1302.98.

An Order Allowing Claims will be submitted according to this opinion.

Dated: March 10, 1972

Michael F. DeFant

Michael F. DeFant,
Acting Judge of Probate

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GOGEBIC

FIRST NATIONAL BANK & TRUST COMPANY OF MARQUETTE, MICHIGAN, Executor of the Estate of George Albert, Deceased,

Plaintiff,

v.

SAMUEL G. ALBERT, M. D., and FRED G. ALBERT, D.P.M.

Defendants.

FILE NO.: 72-38-
WILLIAM F. HOOD
Circuit Judge
(P15104)

ROBERT M. BORDEAU
Attorney for Plaintiff

CASANOVA & RYAN
Attorneys for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this suit for conversion, the plaintiff seeks to set aside a transaction whereby defendant Fred G. Albert, purporting to act through a power of attorney executed by his father, George Albert, sold certain securities of his father and applied the proceeds and other funds to an indebtedness of Samuel G. Albert at a Minnesota Bank. Defendant Fred G. Albert has filed a counter-claim against the estate seeking to recover from the estate $1600.00 of his own funds that were applied for the same purpose.

At a pretrial conference, the parties, through their counsel, stipulated that there be received in evidence in this cause a transcript of testimony taken on February 16, 17 and 18, 1972, in certain probate

proceedings concerned with a claim of defendant Samuel Albert against the father's estate for a balance due for medical services rendered, as well as the deposition of a Dr. Acocks, taken in connection with such probate proceedings. Based upon the pleadings in this case, testimony taken at a hearing in this cause on March 4, 1974, the depositions of Frank E. Hook, Louis J. Patek, Samuel G. Albert and Fred G. Albert, taken in this cause and the aforesaid testimony and deposition taken in the probate proceedings, this Court, sitting without a jury, makes the following findings and conclusions pursuant to GCR 517.1.

Findings of Fact

1. Plaintiff's decedent George Albert died in the afternoon of November 24, 1970, at the age of 82. The defendants are two of his ten children. Defendant Samuel G. Albert is a doctor of medicine, residing in Ironwood, Michiga. Defendant Fred G. Albert is a doctor of podiatric medicine, residing in Austin, Minnesota.

2. With the exception of a three-day period in May, 1970, the decedent was under the medical care of defendant Samuel G. Albert from December 1969 until his death. Except for the same three day period, the decedent was cared for in the home of the decedent Samuel G. Albert from March 1970 until his death. During most of this time, many of the defendants' brothers and sisters were denied permission to enter defendant Samuel Albert's home and thus were denied any direct contact with their

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father.

3. In December 1969 when decedent became the medical patient of his son, Dr. Samuel Albert, decedent was seriously ill. In the words of defendant Samuel Albert: "His condition was very, very serious. In fact, I thought it was too late to come back on the case and do much good. But I agreed to devote all my time, that I could, as humanely possible, and he had a severe lung infection with multiple organisms that were very resistant because of the long standing exposure to various drugs that he had in the hospital. He had pulmonary emphysema. He had great difficulty in swallowing. Each time he attempted to eat, there would be repeated attacks of vomiting. And, with each attack of the vomiting, he would have a certain amount of aspiration into the lungs. He had Parkinson's -- and he was unable to do an awful lot of things that -- I think could have been prevented -- before -- He had a large hydrocele; he had a large inguinal hernia; he had difficulty with his bowel movements; he had an indwelling catheter; he was running fevers -- off and on; he had difficulty in speech but he could, at all times, not only then but even later, comprehend and communicate with us through gestures -- through saying, "yes" and "no", and, often times, -- earlier in the care that I had -- he was making complete statements -- those would vary from period to period. But he was in constant need of care right around the clock." From that time until his death, he became progressively worse. He had had a stroke. Most of the time he was fed through a tube. He was not ambulatory and was, in fact, physically helpless.

4. Until decedent was moved into defendant Samuel Albert's home, he lived (except for one or more lengthy stays in a hospital) at his own home in Ironwood with another son, John Albert, to whom a power of attorney had been granted. The power of attorney to John Albert continued in effect while decedent was in Samuel Albert's home until October of 1970. During this interval, dispute arose between Samuel Albert and Fred Albert over payment of medical bills submitted by Samuel Albert for the care of his father. During the eleven months interval preceding the decedent's death, Dr. Samuel Albert was paid the sum of $26,876.12 for medical care rendered his father during that period, but was submitting bills for substantial amounts above that sum, to the extent that the claim of Samuel Albert for medical care and services rendered to his father during the eleven month period prior to the father's death amounted to $47,006.75 over and above the $26,076.12 he received.

5. Because of the dispute over the bills, John Albert stated in October of 1970 that he no longer desired to act as attorney in fact. On October 21, 1970, by guiding decedent's hand, decedent's signature and mark were obtained on an instrument appointing defendant, Fred Albert, as decedent's attorney in fact. In the same manner on November 12, 1970, decedent's signature and mark were affixed to a second document, broader in form, also appointing defendant Fred Albert as decedent's attorney in fact. Photocopies of both such documents so executed are attached to plaintiff's complaint marked Exhibit "A".

6. At the time of the execution of the power of attorney of October 21 and November 12, 1970, decedent was incapable of communicating with the possible exception of expressing assent or dissent; thus his desires could only be determined by suggesting to him what he might or might not want and obtaining his assent or dissent.

7. On or about November 14, 1970, defendants Samuel G. Albert and Fred G. Albert executed a document, photocpy of which is attached to plaintiff's complaint as "Exhibit B", and which reads as follows:

"November 14, 1970. Ten years after date, for value received, the undersigned promises to pay to the order of Mr. Geroge Albert, thirty-five thousand dollars ($35,000.00)..with no added interest charges.

Signed /s/ S. G. Albert, M. D.

Date November 14, 1970

"This loan is made through the undersigned, acting as Power of Attorney for Mr. George Albert with his full knowledge and at his specific request. Funds to cover this loan are to be made available through the sale of certain securities and supplemented by cash if necessary as agreed to by Mr. George Albert on this November 14, 1970.

Signed /S/ Fred G. Albert, D.P.M.

Dated 11/14/70 "

8. On November 23, 1970, the defendant Fred Albert instructed a broker by telephone to sell certain stocks held by the decedent. The sale was executed on the 23rd and 24th of November, but it was not until December 18, 1970, that the broker issued its checks representing the proceeds of the sale.

9. On the morning of November 24th, defendant Fred Albert opened an account in the Northwestern State Bank of Austin, Minnesota, the title of the account being "Dr. Fred G. Albert, Power of Attorney for George Albert". He immediately issued a check on that account in the amount of $35,000.00, payable to Dr. Samuel Albert and mailed such check to Dr. Samuel Albert with a letter instructing Dr. Samuel Albert not to cash the check until the money from the sale of the stocks had been received. On the afternoon of November 24th, 1970, the decedent died. The check and letter was received by Samuel Albert several days later.

10. Sometime on or before December 21, 1970, defendant Samuel Albert endorsed the $35,000.00 check which had been issued to him as aforesaid "for deposit only in Northwestern State Bank, Austin, Minnesota", and delivered it back to defendant Fred Albert. On December 21, 1970, defendant Fred Albert deposited in the above mentioned "power of attorney" account at the Northwestern State Bank of Austin, checks from the broker in the amount of $32,537.39,

representing the proceeds from the sale of the stocks and $1600.00 of his own money, making a total deposit of $34,137.39. Immediately after such deposit, the total balance of said account stood at $35,041.75. On the same date, the $35,000.00 check drawn on that account payable to defendant Samuel Albert, and which was endorsed and returned to the possession of Fred Albert, was delivered by Fred Albert, to the Northwestern State Bank and applied in payment of a note for Samuel Albert in the amount of $32,983.22, which note was due December 24, 1970. On the note defendant Fred Albert was jointly liable for he had signed said note as a joint maker as an accommodation to defendant Samuel G. Albert. The check in the amount of $35,000.00 was cleared that day leaving a balance in the power of attorney account of $41.75.

11. The "loan" of the $35,000.00 to defendant Samuel Albert from his father's assets was made at the request of defendant Samuel Albert. There was no consideration for such loan, other than the undertaking to repay it in ten years without interest.

FINDINGS OF ULTIMATE FACTS
AND CONCLUSIONS OF LAW

A. The "loan" was the equivalent of a gift of the use of the money for a ten year period, and the validity of the transaction is to be tested by the same legal principles that apply to a gift or to a sale for a grossly inadequate consideration.

B. The power of attorney in and of itself authorized the defendant Fred G. Albert to act only for the benefit of the principal and did not authorize him to give away the principal's property either permanently or for any extended period. The power of attorney in and of itself, therefore, could not and did not furnish authority for Fred G. Albert to enter into the "loan" transaction with defendant Samuel G. Albert.

C. At the time the loan transaction was conceived and entered into, the decedent was under the care, control, and domination of the defendants; and the decedent was aged, physically infirm to the point of being physically helpless, and had no more than a minimal capacity to communicate.

D. The "loan" transaction was for the benefit of both defendants since the proceeds were used to pay a note on which they were both liable.

E. Both defendants were in a fiduciary position with respect to the decedent and his property, arising from their kinship with the decedent, the doctor-patient relationship between the defendant Samuel G. Albert and the decedent, the existence of the poer of attorney, the exclusion of the other children of the decedent from any contact with the decedent, and the complete dependence of the decedent upon the defendants for all of his needs.

F. Under such circumstances, there was and is a legal presumption that any consent on the part of the decedent to

the transaction was the product of undue influence; and the burden of proof was on the defendants to establish that the transaction was fair and reasonable and not the product of undue influence. The defendants have not sustained such burden of proof. The transaction was manifestly unfair, and the product of undue influence, and should be set aside for that reason.

G. Even if the transaction was not the product of undue influence, the defendant Fred G. Albert had no authority on December 21, 1970, to appropriate the proceeds of the sale of the securities to the payment of $35,000.00 check; nor did he have authority to appropriate to that purpose the other balance of the "power of attorney" bank account of that day, except for the $1600.00 of his own money. The power of attorney which had been issued to him was not coupled with an interest, and terminated, at the latest, on the death of the decedent. Except for the $1600.00, constituting Fred G. Albert's personal contribution, the application on December 21, 1970, of the proceeds of the securities sale and the other funds in the decedent's bank account to the payment of the $35,000.00 check was a conversion of funds belonging to the decedent's estate.

H. Defendant Fred G. Albert's counterclaim for the return of the $1600.00 of his own funds applied to the payment of the check is without merit, since such funds were a voluntary contribution to Samuel Albert which in no way benefited the decedent's estate.

I. Plaintiff is entitled to a judgment against both defendants jointly and severally in the amount of $33,400.00, plus interest thereon at the rate of 5% per annum from December 21, 1970, to May 10, 1972, the date on which the complaint in this cause was filed. Such interest is computed by the Court as $ 2,310.54, making a total judgment of $35,710.54 . Plaintiff may tax costs.

Plaintiff's counsel shall prepare a judgment in accordance herewith and process the same for entry in accordance with GCR 522.

Dated: August 15, 1974.

WILLIAM F. HOOD
Circuit Judge.

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STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF GOGEBIC

FIRST NATIONAL BANK & TRUST COMPANY OF MARQUETTE, MICHIGAN, Executor of the Estate of George Albert, Deceased,

Plaintiff,

vs.

SAMUEL G. ALBERT, M.D. and FRED G. ALBERT, D.P.M.,

Defendants.

File No. 72-38

WILLIAM F. HOOD
Circuit Judge
(P15104)

ROBERT M. BORDEAU - P11005
Attorney for Plaintiff

PETER W. RYAN
Attorney for Defendants

JUDGMENT

At a session of said Court, held in the Courthouse, in the City of Bessemer, Michigan, on the 28th day of August, 1974.

PRESENT: HONORABLE WILLIAM F. HOOD, CIRCUIT JUDGE, ON ASSIGNMENT

The above entitled action having been tried by the Court without a jury, and the

Court having filed findings of fact, and having concluded that judgment should be rendered for the Plaintiff and against the Defendants, jointly and severally.

IT IS ORDERED AND ADJUDGED that the Plaintiff recover of the Defendants, jointly and severally, the sum of Thirty-five Thousand Seven Hundred Ten Dollars and Fifty-four Cents ($35,710.54), together with costs and charges to be taxed, with interest thereon at the rate of six per cent (6%) per annum from May 10, 1972, the date of filing of the complaint herein.

WILLIAM F. HOOD
CIRCUIT JUDGE

be sustained.

THE COURT: Any response?

MR. MILLER: Just two quick points, your Honor. Mr. Bordeau claims self-interest with respect to Fred Albert and the negotiation of this loan to Sam Albert. I don't think that there is any place in the testimony, in my reading of the testimony, with respect to what the intent was to do with the proceeds of that loan. I don't think that anybody had decided what to do with it until a later date when the proceeds were received and Dr. Sam was notified that the proceeds were received and he had decided to pay off the note. He had never been pressured to pay off that note by the Austin bank, just that he had decided, let's pay it off.

Another thing is, Mr. Bordeau indicates that the fiduciary entered into the agreement. Yes, his signature appears on the note, but it was at the direction of his principal. There is absolutely no ifs, ands, or buts but that George Albert made the loan to Sam. He wanted to give him the money, Sam said, "No, make it a loan that I can repay you."

That's all, your Honor.

THE COURT: Very well.

Well, this is a long, involved matter, it is certainly regrettable that the matter

continues to be unsettled, and I'm sure all parties look forward to the day when it can be completely and finally settled.

But as to the merits of the motion for new trial, certainly as far as the written motion for new trial is concerned the ground of the motion is that the decision was against the great weight of the evidence. Counsel has here stated that it is important that the new trial be granted so that the Court can hear in person the testimony of some of those whose testimony was submitted to the Court in the form of deposition or testimony taken elsewhere.

But this is not a motion for new trial based upon newly discovered evidence. If it were it would habe to be alleged of course, to be entitled to a new trial on that ground, that these witnesses that it is now requested the Court hear were not known and were not available at the time of the trial, and that this important new evidence that they can present was not known or could not have been discovered in the exercise of reasonable diligence, and this would have to be shown by affidavit or otherwise. And it also would have to be shown that such additional testimony would quite clearly change the result of the trial.

The motion hasn't been made on that

ground at all, at least the written motion. To the extent that it may be claimed that counsel has made that orally, the motion for new trial on that ground, the requirements for the granting of a new trial on that ground have not been met. Specifically the argument is that the testimony that was presented does not justify the decision that was made.

Now this involves one of two things. Either a showing that some specific finding of fact made by the Court was erroneous, or that the finding of fact which the Court did make did not state the conclusion.

Now if it is the former, that a finding of fact that the Court made was not supported by the evidence, I have not heard here today precisely what finding of fact is referred to as being erroneous. There is for example the claim that the Court found the loan was without consideration and that this is an erroneous finding, but actually the Court's finding is set forth in paragraph 11 of the findings of fact, "There was no consideration of such loan other than the undertaking to repay it in ten years with no interest," and I have no heard here anything that would contradict that finding of fact.

Now I might mention that if the mere undertaking to repay in ten years without interest

is a valid consideration for a contract, then there is no reason why this same attorney in fact could not have loaned one hundred thousand dollars, or two hundred, or the entire assets of this decedent, for not just ten years or twenty years or fifty years or one hundred years. Where would be the dividing line on what period of time he could loan away the assets, and where would be the dividing lines on the amount of assets that he could loan away for free use, and say that this is a binding contract because that was the consideration, to give it back or return it at some short or long period of time in the future.

Now there was the argument made here that there was not evidence of mental incompetency, that the testimony does not warrant a finding of mental incompetence. But where is the finding? The findings of the Court that are set forth and numbered from one to eleven, where is the finding in that regard, that a claim here was made that was erroneous? I don't believe anywhere in these findings is contained that finding which they say isn't warranted by the evidence, the finding of mental imcompetence.

The Court did find that the decedent at the time of this transaction was infirm to the point of being physically helpless. Certainly nothing has been

presented here to show that the finding was erroneous, nor has there been any attempt to show that the record would not support that finding. And the Court also stated and concluded that at this time, the time of this transaction, the decedent had no more than a minimal capacity to communicate. And it seems to me that that is completely supported in the record, and at least I have heard no argument here that it was not, if that is the finding which is claimed is not supported by the evidence.

Now as to the argument that the securities that were taken to make this $35,000.00 loan didn't belong to the estate, I think it is rather an odd argument. This loan, the defendant says that this was acquired pursuant to a loan made by this decedent, and the note was made by the defendant to the decedent. And the whole claim of the transaction is that the proceeds from these securities were obtained and were used in order to make that loan, and now the claim is made apparently that the loan was made by somebody else, or that somebody else's property was taken and used to make the loan that was being made they say by the father. And to me this is rather an odd argument to make after all these proceedings and where it is insisted that this was a loan by the father.

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In short, I do not feel that any showing has been made that any precise finding of fact in this Court's findings of fact and conclusions of law was in error as not supported by the evidence, nor have I heard any argument that the conclusions of law were not supported by the facts as found, and therefore the motion for a new trial will be denied.

Mr. Bordeau, if you would prepare a form of order denying the motion for new trial and submit it to Mr. Miller for approval as to form.

MR. MILLER: Fine. We shall submit the original to your Honor, and move for transfer over to Gogebic County.

THE COURT: Yes, if it is sent to me for signature, if you want me to transport it on directly, why send along an envelope to whoever you want it to go to and I will mail it back to counsel or the Court for filing as you request.

MR. MILLER: Fine.

THE COURT: Now I don't intend to file a written opinion regarding this, and you may of course for the purposes of appeal desire a transcript of the proceedings.

MR. MILLER: Yes.

* * * * *

STATE OF MICHIGAN

COURT OF APPEALS

LANSING

TO ATTORNEYS OF RECORD

Gentlemen:

Enclosed herewith is the decision and opinion in the entitled appeal.

We are releasing this opinion today. Publication, however, will be withheld until editorial work in the State Reporter's office is completed. Pursuant to GCR 821.1, no "per curiam or memorandum opinions [illegible] to be printed unless so directed by any of the judges deciding the case." A publication stamp appears on the face of opinions so directed by a hearing judge. Opinions not designated for publication at the time of release are printed on pink paper.

Please note that the official date of the filing of this opinion is the date stamped thereon. This letter is also notice to you of the entry of the order of the Court of Appeals [see GCR 853.2(1)1. All time periods for further action under the rules will run from the date stamped on the opinion.

We hope you will find this procedure helpful in that it permits us to furnish you with our decision immediately. However,

we hope you will be mindful that where publication is involved, the forthcoming editorial work may produce slight revision in style or citations that will appear in the printed opinion.

Very truly yours,

Ronald L. Dzierbicki
Chief Clerk

Enclosure

c/c: Trial Judge
or Agency

CA45CL573

STATE OF MICHIGAN

IN THE COURT OF APPEALS

DEC 10 1975

FIRST NATIONAL BANK &
TRUST COMPANY OF
MARQUETTE, MICHIGAN,
Executor of the Estate
of GEORGE ALBERT, Deceased,
Plaintiff-Appellee,

-v- No. 22244

SAMUEL G. ALBERT, M. D., and
FRED G. ALBERT, D.P.M.,
Defendats-Appellants.

BEFORE: Allen, PJ; and Danhof and Cavanagh, JJ.

ALLEN, PJ

The instant conversion suit brings to the Court's attention another appeal in a series of litigation involving the Albert family of Ironwood, Michigan. To our knowledge no family has contributes so much to the length of the bookshelves of the Michigan Bar.[1]

The facts concern the last year of the life of George Albert who died on November 24, 1970 at age 82, leaving by will an estate of approximately $250,000 to be equally divided among his 10 children. From a judgment in favor of the Executor requiring repayment to the estate of $33,400.00, plus interest, defendants appeal.

George Albert was a remarkable, inde-

pendent, irascible, and affluent man. He imparted his fierce independence and much of his affluence to the siblings who participated in the instant family squabble: Samuel Albert, a physician in Ironwood; Fred Albert, a doctor of podiatry in Austin, Minnesota; John Albert, who owns the family clothing store, James Albert, a doctor of podiatry in Ironwood; Michael Albert, who worked in the family clothing store, and LaMese K. Davies. During the summer of 1969, the aged and terminally ill George Albert returned from the hospital at Duluth, Minnesota to his home in Ironwood. John Albert lived with George in the family home until December 22, 1969, and, up until October 21, 1970, took care of the father's business under a power of attorney.

By mid-December, 1969, George's health had deteriorated to the extent that family members agreed that Samuel Albert ought to take care of his father. Dr. Sam agreed to the assignment on the condition that he would be reimbursed for his services and that there would be no interference by other members of the family. From December 22, 1969, to his father's death on November 24, 1970, Dr. Sam cared for his father, charging $73,882.80 for services rendered. John Albert, acting under his then power of attorney, paid $26,876.12 to Sam during George's lifetime, leaving $47,606.75 due from the estate. The balance due has become the subject of litigation currently on appeal to this Court. Dr. Sam described his father's condition when he first took over his care in December, as follows:

"His condition was very, very serious. In fact, I thought it was too late to come back on the case and do much good. But I agreed to devote all my time, that I could, as humanly possible, and he had a severe lung infection with multiple organisms that were very resistant because of the long standing exposure to various drugs that he had in the hospital. He had pulmonary emphysema. He had great difficulty in swallowing. Each time he attempted to eat, there would be repeated attacks of vomiting. And, with each attack of vomiting, he would have a certain amount of aspiration into the lungs. He had Parkinson's -- and he was unable to do an awful lot of things -- I think could have been prevented -- before -- He had a large hydrocele; he had a large inguinal hernia; he had difficulty in speech, but he could, at all times, not only then but even later, comprehend and communicate with us through gestures -- through saying, "yes" and "no" and, often times, -- earlier in the care that I had -- he was making complete statements -- those would vary from period to period. But he was in constant need of care right around the clock."

Dr. James Albert, disputing Dr. Sam's contention that George was mentally alert, testified as follows with respect to the condition of his father in May, 1970:

"Q Could he get out of bed by himself?

A No, he could not.

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Q Could he walk?

A No, he could not.

Q Could he engage in a conversation?

A He would -- He would respond to "Yes" -- with a "Yes," or a "No" answer. But my dad would answer "Yes" to almost anything if you asked in a -- in a positive way, he would answer in a positive -- If you asked him in his a negative -- he would answer in a negative --

THE COURT: Are you trying to say that, in his condition then -- his physical condition, his mental condition, then -- that he was subject to being easily influenced;

WITNESS: Yes

THE COURT: In responding?

WITNESS: Yes I would say --

During the summer and early fall of 1970 the children feuded over their father's affection and the conditions which Dr. Sam had established for George's care. Mike and James charged that all of the family, save John and Fred, were barred by Dr. Sam from visiting their father. Mike, locked out of the home in March 1970, broke the front window to enter. La Mese, upset that her father had deeded the family clothing store to John, returned home where it is claimed George informed her that he had not intended to make the gift to John. On the other hand. Dr. Sam contended that he did

deny access to certain family members both because they upset his treatment of George and because George, irritated that they had sought to declare him mentally incompetent in 1969, did not want them to visit.

Following the window breaking incident, Dr. Sam moved George to Sam's own home after which he added $45 a day to his monthly bills for George's care. The bills were submitted to John, who was authorized to pay them under the power of attorney which he then held. In May 1970, Sam demanded payment in full of the charges he had made to date; but John refused on the grounds of lack of cash. This difference was resolved when Sam accepted payments in part, but by October when Sam again demanded payment in full, John elected to withdraw as attorney in fact. Accordingly, a new power of attorney, naming Fred as attorney in fact, was prepared and signed at Sam's home on October 21, 1970. On November 12, 1970, a new power of attorney granting Fred Albert broader powers was executed at Sam's house. Each document was drafted by former congressman and attorney, Frank Hook, and signature was obtained by either Fred or Attorney Hook guiding decedent's hand. None of the children, save Dr. Sam, were present when the documents were signed. However, attorney Hook and Dr. Sam claimed George was fully aware of what was being done and that it was at George's request that the papers were prepared.

Two days after the execution of the second power of attorney Fred and Sam signed a promissory note under which Sam in consideration of $35,000.00 paid to him

by his father, would repay the obligation ten years after date without interest.[3] Sam admitted that the idea of a loan was initiated by him in conversation with his father, and that he suggested the terms of the loan:

> "Q Well, Doctor, so you decided you would approach your father for a $30,000 loan and take it as a loan rather than receiving payment on your medical fees on which you would have to report income?
>
> A That's right.
>
> Q And who decided that it would be a ten-year loan?
>
> A I decided for a ten-year loan.
>
> Q Did you ask your father for $30,000 for ten years at zero percent interest? In other words, did you suggest the terms, or did your father suggest the terms?
>
> A I suggested the terms of it. I am making the request. I made the request a number of times and I said, "We will draw up the note.", and he said, "I don't want any note. I want to give it to you.", and as gift I would have to pay a gift tax."

Though the note was both signed and dated November 14, it was impossible to advance Fred $35,000 until certain securities were

first sold. On November 23, some of the certificates of stock which were in the name of John and his father as joint tenants were endorsed by John. Other certificates of stock which were in the name of La Mese were not endorsed by her, but, a blank stock power which had been executed by her some time earlier was used to endorse the certificates. About 1:00 a.m. on the morning of November 24, Fred left Ironwood for his home in Austin, Minnesota taking with him the promissory note and the signed stock certificates. About 11:00 a.m. November 24, Fred, who had arrived in Austin, opened a power of attorney account in the Austin State Bank and wrote a check payable to Sam in the amount of $35,000. He then mailed the check to Sam in Ironwood together with a letter that Sam was not to cash the check until the securities were sold and the funds to cover the check deposited in the Austin bank account. During the afternoon of November 24 George died.

Sometime after George's death, but before December 21, Sam endorsed "for deposit only in the Northwestern State Bank in Austin, Minnesota" the $35,000 check and either mailed or personally delivered it to Fred. On December 21, Fred received checks for $32,537.39 from the brokerage firm handling the sale of securities. Also, on December 21, Fred deposited the checks so received, plus $1,600 of his own money, making a total balance of $35,041.75 in the power of attorney account. On the same date, the $35,000 check was delivered by Fred to the bank and applied in payment of a promissory note given by Sam to the bank for $32,983.22 and which note was due December 24, 1970. Brother Fred had endorsed the note

and was liable as a joint maker. The check for $35,000 cleared that day leaving a balance in the power of attorney account of $41.75. The loan by the Northwestern State Bank to Sam had been made several years earlier and was for the purpose of purchasing securities. Fred received no money on the loan but signed the note because the bank demanded the signature of a Minnesota resident. From time to time the note had been renewed. Correspondence from the bank was introduced in evidence showing that on June 16, 1975, the bank had noted that the market value of the securities had dropped and requested that the balance of the loan be considerably reduced.[4] The last renewal note was dated September 24, 1970 due in 90 days and was mailed by the bank to Dr. Sam by letter dated September 29, 1970, a portion of which reads:

> "According to our earlier comment I thought that you probably would be reducing the principal at this time by some amount. Our collateral position is more in line than what it had been earlier in the year, however, I am sure you know that by cashing in the Savings Certificates we reduced the collateral value which we were holding in connection with this loan.
>
> "I am enclosing a new note for $32,336.49 to mature in 90 days. Please sign the note where I have placed the x and return it to me. We are still expecting a substantial reduction on this line of credit when the present note matures." (Emphasis supplied.)

In a detailed opinion, the trial court ruled in plaintiff's favor giving as its reasons: 1) the so-called loan to Sam Albert constituted a gift, and, since the power of attorney dated November 12, 1970, did not authorize the attorney in fact to give away the principal's property-- either permanently or for any extended period-- the attorney in fact exceeded his power; 2) defendants failed to overcome the legal presumption, arising in cases involving a doctor-patient or attorney-client relationship, that the loan was the result of undue influence; 3) even if the reasons stated in 1 and 2 were nonexistent, the power of attorney terminated at George Albert's death, and Fred Albert was without power to sell the securities or deposit the $35,000.00 check in the Austin Bank. Accordingly, the court concluded that, except for the $1,600.00 contributed by Fred from his personal funds, the application of proceeds on December 11, 1970, from the sale of securities towards payment of the $35,000.00 check was a conversion of funds which belonged to decedent's estate.

Fred Albert's counter-claim for a return of the $1600.00 was rejected, and judgment was entered against defendants, jointly and severally, for $33,400.00 plus interest.

We opine that the lower court reached the correct result based upon the grounds stated in number 2, above. It is undisputed that there was a doctor-patient relationship between George and Sam Albert. Equally clear, is the power of attorney-business relationship between George and Fred Albert. The law deem such to be fiduciary and confidential relationships. See Annot,

Undue Influence in Non-Testamentary Gift from Patient to Physician, Nurse or other Medical Practitioner, 70 ALR2d 591. A fiduciary relationship also exists where, as in the instant case, one who is enfeebled by poor health and incapable of attending to his business affairs, relies on another to manage his business affairs. Williams v Griffin, 35 Mich App 179, 184; 192 NW2d 283 (1971). In the landmark decision In Re Wood Estate, 375 Mich. 278; 289; 132 NW2d 35 (1965) our Supreme Court recognized that:

> "Once such a relationship is established and the fiduciary or an interest which he represents benefits therefrom, the law recognizes a presumption that he in whom trust was reposed exercised his influence unduly.
> * * *
> "The immediate legal effect of a presumption is procedural -- it shifts the burden of going forward with the evidence relating to the presumed fact." (Footnote omitted.)

The Wood principle has been followed in a number of cases holding that where the confidential relationship exists, it is presumed the gift to the fiduciary was obtained via undue influence. Totorean v. Samuels, 52 Mich App 14; 126 NW2d 429 (1974), Taylor v Klahm, 40 Mich App 255, 265; 198 NW2d 715 (1972). Williams v. Griffin, supra.

Defendants do not question the Woods rule, but argue under authority of Williams v. Griffin, supra, that the ultimate burden of proof remains with plaintiff, and plain-

tiff has failed to carry the burden. We are unable to agree for two reasons. First, it is uncertain that the ultimate burden of proof as to undue influence remains with plaintiff in case of this statute. Indeed, a panel of this Court in Totoreau v Samuels, supra, rejected the reasoning of Williams and ruled the burden of proof remained with the recipient of the benificence:

> "We think the Williams Court misread Wood. We read Wood as standing for the proposition that a rebuttal presumption shifts the burden of proof. * * * Therefore, in those cases where (1) plaintiff has the benefit of a presumption which has been rebutted and, thus, reduced to a permissible inference; and (2) the trier of fact determines the evidence of plaintiff and defendant to be equal, the trier of fact should return a verdict for the plaintiff. This can only mean the ultimate burden of proof is on defendant--not plaintiff."

Under this standard, the instant record shows defendants' evidence was insufficient to overcome the permissible inference of undue influence. Secondly, we do not rest our conclusion on Totorean per se. Assuming arguendo, the Williams decision represents the more sound statement of the law,[5] we still believe that the trial court decision was not erroneous.

In essence, the trial court confronted sharply contrasting theories of the case as articulated by the feuding siblings. Sam, Fred, and Attorney Hook testified that despite his physical infirmities, George Albert was fully aware of what he was doing, had a

history of giving gifts to his children, requested the second power of attorney be drawn so that he could legally make the loan, was helped to sign the powers of attorney only because he had Parkinson's disease, and that he actually preferred to make a $35,000.00 gift to Sam rather than a loan, but, knowingly agreed to Sam's proposal that the transaction be a 10-year loan without interest. It is pointed out, moreover, that other family members were barred from Sam's home solely because their presence disturbed the seriously ill father, and that there was little pressure on Sam or Fred by the Northwestern State Bank to repay the 1968 note.

On the other hand, there is James Albert's testimony that his father was easily led, and would respond yes or no depending on how the question was framed. He testified that from March until George Albert's death Sam Albert excluded all the children but Fred from the home, and as early as 1969, Sam was worried about his indebtedness to the Northwestern State Bank. In addition, Joh Albert testified Sam had local indebtedness, and that after John's power of attorney was revoked in October, 1969, he was told by Sam that his presence in the house was unwanted. Of all the witnesses, the two witnesses most removed by relationship from the Albert family were Louis Patek, the notary public and Kathleen Richards, a nurse who cared for George Albert from the time he returned home from the hospital in Duluth in May 1969 until Dr. Sam took over in late December 1969. Their testimony tends to support the findings of the trial court. On three occasions Mr. Patek was asked whether at the time the two powers of attorney

were signed, George Albert acknowledged in any way that he understood that he was signing. Each time Patek avoided a direct answer by responding that he was unqualified to answer the question since he really did not know what George Albert's mental state was at the time. Upon inquiry by the trial judge as to whether George Albert would yield to pressure, Mrs. Richards responded:

> "THE COURT: There has been a statement made here that Mr. Albert was subject to being persuaded to do things very easily--with anybody putting pressure on him. You seem to imply that by the question in your last statement here.
>
> "WITNESS: Oh, I think that I could persuade him to do things. Oh, yes.
>
> "THE COURT: Was that also true with respect to members of the family?
>
> "WITNESS: Oh, certainly. John could persuade him to eat, and he could persuade him to go to bed.
>
> "THE COURT: All right.
>
> "WITNESS: He was --
>
> "THE COURT: He was very -- if somebody put pressure on him, he would give in; was that it?
>
> "WITNESS: Yes."

The letters from the Northwestern State Bank which were introduced in evidence rebut

the testimony of Dr. Sam that there was little pressure placed on him or Fred to pay or substantially reduce the notes due at the bank. Thus, although the issue is admittedly close, our careful reading of the record leads us to conclude that the finding of the trial court is record-supported.

Our conclusion in this regard is buttressed by the recognized rule of law that where a trial court hears sharply conflicting testimony the court may properly choose which testimony it disbelieves. Although Sam and Fred were the only witnesses to personally testify before the trial judge, 6 it is apparent that the court did not choose to fully believe them. An appellate court ought not disturb the lower court's decision of whom to believe. People v Doris Anderson, Mich App ; NW2d (Docket No. 21215, rel'd September 11, 1975). Moreover, even though appellate courts review cases involving equitable matters de novo, we will not reverse the findings of the lower court unless we would reach a different result. Opal Lake Assoc. v Michawe Limited Partnership, Mich App ; NW2d (Docket No. 19524, rel'd August 11, 1975).

We do not imply that defendants committed intentional fraud in the sense that that term is used in the criminal statutes or as commonly understood by the general public. Neither do we imply that Dr. Sam did not properly care for his father. The record is quite the contrary. But we do state that after a meticulous review of the

record, we are neither firmly convinced that the evidence in rebuttal of the presumption arising in cases involving gifts made where there is a doctor-patient or other confidential relationship was overcome by defendants, nor that the trial court erred in its findings of fact.

AFFIRMED, costs to plaintiff.

The sequence is correct

The page is mis-numbered.

FOOTNOTES

[1] Albert v Gamble-Skogmo, Inc, 335 Mich 539; 56 NW2d 263 (1953) Albert v Gogebic County Hospital, 341 Mich 344; 67 NW2d 244 (1954) People v Albert, 358 Mich 647; 101 NW2d 378 (1960) In Re Albert, 383 Mich 722; 179 NW2d 20 (1970) State Bar Grievance Administrator v Albert, 389 Mich 153; NW 2d (1973) and 390 Mich 234; 212 NW2d 17 (1973) Samuel G. Albert v First National Bank, (now pending before Court of Appeals, Docket No. 22909)

[2] Samuel G. Albert v First National Bank, (Docket No. 22909). The hearing record of testimony and exhibits in the hearing on claims in No. 22909 was stipulated by counsel to be a part of the record on appeal in the instant case No. 22244.

[3] "November 14, 1970. Ten years after date, for value received, the undersigned promises to pay to the order of Mr. George Albert, thirty-five thousand dollars ($35,000.00)., with no added interest charges.

Signed /S/ S. G. Albert, M.D.

Date November 14, 1970

"This loan is made through the undersigned, acting as Power of Attorney for Mr. George Albert with his full knowledge and at his specific request. Funds to cover this loan are to be made available through the sale of certain securities and supplemented by cash if necessary as agreed to by Mr. George Albert on this November 14, 1970.

Signed /S/ Fred G. Albert, D.P.M.

Dated 11/14/70

4

"In reviewing this line of credit, we find that we are considerably under collateralized. Because the stock values have decreased considerably in the last few months, it is necessary for us to ask you for a reduction on this loan in the amount of $16,000.00.

"According to a previous comment by Clarence Smith in December of 1969, this note was to be considerably reduced at this time or possibly paid in full." (Emphasis supplied.)

5

For a full discussion of In re Wood Estate, see Callahan, Trusts and Succession, 20 Wayne L Rev 715, 727 (1974).

6

In the trial proceedings only Sam and Fred testified personally. The testimony of Frank Hook and Louis Patek was by deposition. The testimony of other family members was given before the probate court in the hearing on claims and the record thereof was stipulated as part of the record in the instant appeal.

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 15th day of January in the year of our Lord one thousand nine hundred and seventy six.

Present the Honorable

Glenn S. Allen

Presiding Judge

Robert J. Danhof
Michael F. Cavanagh
Judges

FIRST NATIONAL BANK & TRUST COMPANY OF MARQUETTE, MICHIGAN, Executor of the Estate of GEORGE ALBERT, Deceased,
Plaintiff-Appellee, 22244

-v-

L.C. No. 72 38

SAMUEL G. ALBERT, M. D., and FRED G. ALBERT, D.P.M.,
Defendants-Appellants.

In this cause, defendants-appellants having filed In Pro Per an application for rehearing, and nothing in opposition thereto having been filed, and due consideration thereof having been had by the court,

IT IS ORDERED that the application for rehearing be and the same is hereby DENIED.

STATE OF MICHIGAN--ss.
I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan,

do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court of Appeals at Lansing, this 20th day of January in the year of our Lord one thousand nine hundred and seventy-six.

_____
Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 8th day of July in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable
THOMAS GILES KAVANAGH,
Chief Justice,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
LAWRENCE B. LINDEMER,
JAMES L. RYAN,
Associate Justices

CR 17-4

FIRST NATIONAL BANK AND TRUST COMPANY OF MARQUETTE, MICHIGAN,
Executor of the Estate of George Albert,
Deceased,
Plaintiff-Appellee,
v 58064

COA: 22244
LC: 72-38

SAMUEL G. ALBERT, M.D., and FRED G. ALBERT, D.P.M.,
Defendants-Appellants.

On order of the Court, the application in pro per for leave to appeal is considered, and the same hereby is DENIED, because appellants have failed to persuade the Court that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN -- ss.

I, Harold Hoag, Clerk of the Supreme Court of the STate of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it

is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 8th day of July in the year of our Lord one thousand nine hundred and seventy six.

/s/ Colion R. Davis Clerk
Deputy

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 9th day of September, in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable

THOMAS GILES KAVANAGH,
Chief Justice.

CR 17-4a

G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
LAWRENCE B. LINDEMER,
JAMES L. RYAN,
Associate Justices

FIRST NATIONAL BANK &
TRUST COMPANY OF
MARQUETTE, MICHIGAN, Executor
of the Estate of George Albert,
Deceased,
Plaintiff-Appellee,
v 58064 COA: 22244
LC: 7238
SAMUEL G. ALBERT, M. D. and
FRED G. ALBERT, D.P.M.,
Defendants-Appellants.

On order of the Court, the motion in propriis personis by defendants-appellants for reconsideration of this Court's Order of July 8, 1976, is considered and the same is hereby DENIED, because it does not appear that said order was entered erroneously.

STATE OF MICHIGAN -- s.
I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby

certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF,
I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 9th day of September in the year of our Lord one thousand nine hundred and seventy-six.

/s/ Carlin R. Davis Clerk
Deputy

APPENDIX-B

Appendix B

Title 28 Sec. 1257(3)

"Final Judgments or Decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari..where any title,right,privilege or immunity is specially set up or claimed under the Constitution.. or authority under the United States."

Title 28 Sec. 1651

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"

Title 28 Sec. 2101 (c)

" Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the judgment and decree..."

Title 28 Sec. 2104

" An appeal to the Supreme Court from a State court shall be taken in the same manner and under the regulations, and shall have the same effect as if the judgment or decree appealed from had been rendered in a court of the United States."

Appendix B (cont.)

U.S. Constitution, Article III created a Supreme Court vested with original jurisdiction and appellate jurisdiction all the other cases...The Supreme Court has always had authority...to review a final judgment or decree of the highest court of a state.. here..the judgment turns upon a substantial federal question. (Landmark case, Martin v. Hunter's Lessee (1816) 1 Wheaton 304, 4 L.ed 97

Fourteenth Amendment:

"No person shall....be deprived of life, liberty, or property, without due process of law..."

PROOF OF SERVICE

STATE OF MICHIGAN

SS

COUNTY OF GOGEBIC

SAMUEL G. ALBERT, M.D., first being duly sworn deposes and says that he is one of the petitioners, herein, and does certify that three (3) true and exact copies of the within and foregoin Petition for Writ of Certiorari was served upon opposing counsel by placing same in the United States Mail with sufficient postage to ensure delivery to ROBERT BORDEAU, Esquire, 128 Spring Street, Marquette, Michigan 49855, Attorney for the Respondent.

This ____DAY OF DECEMBER, 1976

_____

Samuel G. Albert, M.D.

Subscribed and sworn to
before me this ____day
of December, 1976

_____

Bette J. Beber
Notary Public, Gogebic Co.
Michigan
My Comm. Exp. _____

Supreme Court, U. S.
FILED
JAN 4 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-851

SAMUEL G. ALBERT, M.D., and
FRED G. ALBERT, D.P.M.,
Petitioners,

vs.

FIRST NATIONAL BANK AND TRUST COMPANY OF MARQUETTE, MICHIGAN, EXECUTOR OF THE ESTATE OF GEORGE ALBERT, DECEASED,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

RESPONDENT'S BRIEF IN OPPOSITION

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Attorney for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. --------

SAMUEL G. ALBERT, M.D., and
FRED G. ALBERT, D.P.M.,

Petitioners,

vs.

FIRST NATIONAL BANK AND TRUST COMPANY OF MARQUETTE, MICHIGAN, EXECUTOR OF THE ESTATE OF GEORGE ALBERT, DECEASED,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

---

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Michigan (Petitioners' Appendix A) is reported at 66 Mich App 252. The Supreme Court of the State of Michigan denied leave to appeal without opinion (Petitioners' Appendix A).

JURISDICTION

The jurisdictional requisites are not adequately set forth in that the petition does not contain the statement of grounds on which the jurisdiction of this Court is invoked as required by Rule 23, Rules of Supreme Court.

STATEMENT

The facts of the case are stated fully in the Decision of the Court of Appeals of the State of Michigan (Petitioners' Appendix A).

ARGUMENT

Respondent opposes the Petition for Writ of Certiorari for the reason that this controversy does not involve any issue arising under the Federal Constitution or statutes of the United States. The state court decisions rested solely on independent and adequate state grounds, and federal questions were neither raised nor decided.

A. Inasmuch as no substantial federal question is involved in this case, it seems almost unnecessary to point out that the question of jurisdiction of the Circuit Court (Pet., pp. 19-22) was never properly presented below. Under Michigan law, objection to jurisdiction is waived unless made in the responsive pleading on motion first filed. GCR 1963, 116. (Respondent's Appendix A). At no time did Petitioners file a motion for accelerated judgment in Circuit Court under GCR 1963, 116 or allege lack of jurisdiction in their Answer to the Circuit Court Complaint (Respondent's Appendix B). Further, it is submitted that complaints alleging conversion of estate assets or breach of fiduciary relationship are properly brought in the Circuit Court for the county in which the estate is being probated (Respondent's Appendix C, Opinion of Gogebic County Circuit Court, pp. 1-4).

Petitioners argue further that the Circuit Court lacked jurisdiction because Respondent did not have an order of the Probate Court authorizing it to institute the Circuit Court action (Pet., pp. 23-41). However, in its attempt to elevate this argument to a federal question, Petitioners cite no authority which would require such an order. Again, it should be noted that Petitioners failed to raise this alleged defect in their Circuit Court Answer. In addition, it is submitted that it is not necessary for Respondent to obtain an order authorizing the filing to suit. Respondent did seek instruction from the Probate Court, and the Court did concur with Respondent that it would be appropriate to bring an action in Circuit Court. It is submitted that the fiduciary has a duty to marshall the assets and, if necessary, file suit in Circuit Court to recover assets. In this case, it was incumbent upon the executor to recover securities which had been substituted by an unsecured promissory note at zero per cent interest per annum payable in ten years.

B. Petitioners claim that they did not obtain a fair and unbiased tribunal consistent with procedural and substantive due process (Pet., pp. 42-55). They claim that the probate judge was biased and prejudiced and, therefore, Petitioners did not obtain a fair hearing. It should be noted, however, that the probate judge did not hear the conversion case in Circuit Court. Although the testimony taken at the hearing on claims in Probate Court was admitted in the Circuit Court conversion case, it was admitted by stipulation of both attorneys of record (Respondent's Appendix D).

The claim that the circuit judge was biased and unfair is based upon an objection to the Court's ruling on Motion for New Trial. Respondent submits that the Circuit Court was correct in denying the Motion for New Trial. In addition, it should be noted that neither claim of bias was raised on appeal to the Michigan Court of Appeals, but was raised for the first time in Petitioners' Application for Leave to Appeal to the Supreme Court of Michigan.

Thus, this claim was never properly preserved for appeal.

C. Petitioners' claim that all of the proper parties in interest were not before the Circuit Court involves solely a question of state law as Petitioners point out in their brief (Pet., p. 57) and, accordingly, should not be reviewed by this Court. Furthermore, it was not until the completion of the Circuit Court action, and after the judgment was entered, that Petitioners, on Motion for New Trial, raised the question of proper parties. Petitioners also failed to raise this issue in the appeal to the Michigan Court of Appeals. Therefore, the question was never properly preserved below.

D. Petitioners' claim that no conversion took place (Pet., pp. 57-61) involves no federal question. Rather, it is one of fact and state law upon which the Circuit Court and Michigan Court of Appeals Decisions (Petitioners' Appendix A) were based. Furthermore, Petitioners cite no authority upon which this Court might base a decision to review the state court decisions. Petitioners argue simply that the lower courts were wrong in finding that conversion of funds took place. Again, no reason is apparent for review by this Court of the decisions below.

E. Petitioners claim further that, although they raised the federal question of due process in the state courts, those courts failed to consider this issue (Pet., pp. 62-64). It is submitted that the very fact that the state courts did not pass on a federal question would preclude review by this Court. See *Black vs. Cutter Laboratories*, 351 US 292, 100 L ed. 1188, 76 S Ct. 824, reh. den. 352 US 859, 1 L ed. 2d 69, 77 S Ct. 21.

Furthermore, Respondent submits that the state grounds were sufficient to support the state court judgments and that a decision on the federal question of due process was unnecessary to the courts' determination of the cause. This Court has often held that it will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions. This principle has been applied not only to cases involving state substantive grounds, but

also in cases involving state procedural grounds. *Henry vs. State of Mississippi*, 379 US 443, 448; 85 S Ct. 564, 567 (1965).

Finally, it should be noted that the issue of due process was not raised on appeal to the Michigan Court of Appeals and, therefore, was not properly preserved for appeal (Pet., p. 62).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN F. ADAMINI
Attorney for Respondent

KENDRICKS, BORDEAU, CASSELMAN
AND ADAMINI, P.C.
128 West Spring Street
Marquette, Michigan 49855
(906) 226-2543

APPENDIX A — Michigan General Court Rules of 1963, 116.1 & .2

Rule 116 Accelerated Judgment.

.1 Grounds. In a party's first responsive pleading, or by motion filed not later than his first responsive pleading, a party may demand that service of process be quashed or that judgment be entered dismissing 1 or more claims asserted against him upon any of the following grounds:

(1) the court lacks jurisdiction of the person or property,

(2) the court lacks jurisdiction of the subject matter,

(3) the party asserting the claim lacks legal capacity to sue,

(4) another action is pending between the same parties involving the same claim,

(5) the claim is barred because of release, payment, prior judgment, statute of limitations, statute of frauds, infancy, or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

.2 Consolidation. The defense of lack of jurisdiction over the person or property is waived unless made in the responsive pleading or motion first filed. A party may combine in a single motion as many defenses or objections as he has based upon any of the grounds enumerated in sub-rule 116.1, and no more than 1 motion shall be permitted each party. No defense or objection is waived by being joined with one or more other defenses or objections, and whenever a motion to dismiss or a demand to quash service of process is denied, the action shall proceed without prejudice to the defendant's right to assign error as to such denial.

APPENDIX B — Circuit Court Answer of Petitioners

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF GOGEBIC

First National Bank and Trust Company of Marquette, Michigan, Executor of the Estate of George Albert, Deceased,
Plaintiff,

vs. File No. .....

Samuel G. Albert, M.D., and Fred G. Albert, D.P.M.,
Defendants.

ANSWER

NOW COMES the Defendants, Samuel G. Albert, M.D. and Fred G. Albert, D.P.M. by Bridges and Collins their attorneys and answer Plaintiff's Complaint as follows:

1. Defendants admit the allegations contained in paragraph 1.
2. Defendants admit the allegations contained in paragraph 2.
3. In answer to paragraph 3 of the Complaint the Defendants admit that George Albert died on the 24th of November 1970 and further admit that he had been ill for a considerable length of time; and in further answering said paragraph Defendants deny any inferences that may be raised in said paragraph.
4. Defendants admit the allegations contained in paragraph 4.
5. Defendants admit the allegations contained in paragraph 5.
6. Defendants admit the allegations contained in paragraph 6.

7. In answer to paragraph 7 the Defendants admit that on November 24, 1970 the Defendant, Fred G. Albert executed a check payable to Samuel G. Albert in the amount of $35,000.00 and admit further that at the time of executing said check the Defendant, Fred G. Albert knew there were insufficient funds in the account to cover the check and in further answering said paragraph the Defendants aver that said check was executed and mailed by the Defendant, Fred G. Albert on the morning of November 24, 1970 and that the deceased George Albert died in the afternoon of November 24, 1970.

8. In answer to paragraph 8 the Defendants admit the ordering of the sale of stock but deny that any order was placed on the 24th of November and allege that the order was placed with the broker early in the morning of November 23. In further answering said paragraph Defendants have no personal knowledge of the exact time that the sales were consummated by Piper Jaffray and therefore leave the Plaintiff to his proofs.

9. In answer to paragraph 9 the Defendants deny delivery of the certificates to Piper Jaffray on November 25 and allege the same to have been mailed prior to November 25. The date of mailing constituting the proper date of delivery rather than the date they were received by Piper Jaffray.

10. In answer to paragraph 10 the Defendants deny that the securities were owned as alleged by George Albert and purchased by him with his funds but allege the truth in fact to be that they were jointly owned some with John Albert and some with Lamice Albert. In further answering said paragraph the Defendants have no knowledge whose funds were invested in the purchase of said stocks and therefore leave the Plaintiff to his proofs thereon.

11. In answer to paragraph 11 the Defendants admit that Fred G. Albert made a deposit but deny having received any check from Piper, Jaffray & Hopwood in the amount of $35,000.00 but allege that the $34,137.39 which was deposited in said account was composed of three checks, one from Piper, Jaffray & Hopwood in the amount of $15,854.95 and one from Piper, Jaffray & Hopwood in the amount of $16,682.44 making a total of $32,537.39. The

third check was from the Defendant, Dr. Fred G. Albert, in the amount of $1600.00 making a total deposit of $34,-137.39. In further answering said paragraph the Defendants admit the check was deposited in the Northwestern State Bank of Austin, Minnesota.

12. In answer to paragraph 12 the Defendants deny the allegations therein contained.

COUNT I

MENTAL INCOMPETENCE

13. Defendants deny the allegations contained in paragraph 13.

COUNT II

UNDUE INFLUENCE AND DURESS

14. Defendants deny the allegations contained in paragraph 14.

COUNT III

ATTORNEY IN FACT ACTED BEYOND THE SCOPE OF POWER OF ATTORNEY

15. In answer to Paragraph 15 the Defendants deny that Dr. Fred G. Albert at any time exceeded any actual or extensible authority given by the deceased, George Albert, and in further answering the paragraph deny that Fred G. Albert made any loan to Samuel Albert and allege the truth in fact to be that the loan was in fact made by the deceased, George Albert, during his lifetime and that any actions by Dr. Fred G. Albert were at the direction of the deceased, George Albert.

COUNT IV

BREACH OF FIDUCIARY RELATIONSHIP

16. In answer to paragraph 16 the Defendants deny each and every allegation therein contained.

COUNT V

CONVERSION

17. In answer to paragraph 17 Defendants deny any allegations as to wrongful conduct or actions on the part of either of the Defendants.

COUNT VI

INTENTIONAL AND FRAUDULENT MISCONDUCT

18. In answer to paragraph 18 the Defendants deny the allegations therein contained.

WHEREFORE, Defendants demand that this action be dismissed and that any relief prayed for by Plaintiff be denied.

BRIDGES AND COLLINS
Attorneys for Defendants
By: (s) James M. Collins

Dated: Sept. 13, 1972

APPENDIX C — Opinion of Gogebic County Circuit Court, pages 1-4

(1)

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF GOGEBIC

First National Bank and Trust
Company of Marquette, Michigan,
Executor of the Estate of
George Albert, Deceased,
Plaintiff,

vs. File No. 72-38 NZ

Samuel G. Albert, M.D., and
Fred G. Albert, D.P.M.,
Defendants.

NON-JURY TRIAL

Proceedings had before the HONORABLE WILLIAM F. HOOD, Judge by appointment to the Thirty-Second Judicial Circuit of Michigan, at Bessemer, Michigan, in the Courthouse on March 4, 1974, at 1:00 p.m.

APPEARANCES:

MR. ROBERT BORDEAU
Kendricks & Bordeau, P.C.
Marquette, Michigan
On behalf of the Plaintiff

MR. OSWALD G. CASANOVA
Casanova & Ryan
Crystal Falls, Michigan
On behalf of the Defendants

James A. Joplin — Official Court Reporter

(2)

Bessemer, Michigan
March 4, 1974 — 1:00 P.M.

PROCEEDINGS

THE COURT: This is the case of the First National Bank and Trust Company of Marquette, Executor of the Estate of George Albert, Deceased, versus Samuel G. Albert, M.D. and Fred G. Albert, D.P.M., File No. 72-38, which is before the Court at this time for trial. There were three motions filed in this case and the Court has indicated by letter to counsel that all such motions would be denied and the letter stated that counsel would be informed of the reasons for such denial at the opening of the trial here today, the reasons to be stated on the record.

The first motion was Plaintiff's Motion for a Summary Judgment which was filed on December 21st, 1973, and as to this motion, which is based upon the claim that there are no material issues of fact, there is no material dispute on the issues of fact necessary to a decision in this case. The Court feels that this is a situation where the facts are complicated, such things as motives and intentions and matters of this kind are involved in the issues here, and that different inferences may be drawn from undisputed facts. The inferences to be drawn are nevertheless still questions of fact, and the Court felt that this case should not be decided upon the basis of a summary judgment, but that all (3) of the facts and reasons and motives behind certain of the acts, opportunity should be given to present testimony, and that as stated it should not be decided on the basis of a summary judgment. Even the matter of relief to be granted might depend upon such things as motives. For this reason Plaintiff's Motion for Summary Judgment is denied.

Now, the Defendant, Samuel Albert, in pro per, filed a Motion for Summary Judgment on January 2nd, 1974. The substance of that motion is that the Complaint does not state a claim upon which relief can be granted, it being the claim that the claims are mere conclusions and not a statement of complaint, not a factual statement of the

claim. This motion is denied simply on the grounds that it is not correct. The allegations are factual in nature and the Complaint, in view of the form being the defendants in the cause, they are required to defend and that motion is therefore denied.

The second motion on the part of the Defendants was a motion by Samuel Albert, again acting in pro per, for accelerated judgment. This was also filed on January 2, 1974. The claim in this Motion for Accelerated Judgment was exclusive jurisdiction for this controversy is in Probate Court and it was further claimed that the Probate Judge did not sign an order authorizing a substitution of this action, and the Plaintiff is bringing this action as agent for some of the heirs and has no capacity to sue the Defendants as heirs. (4) This motion is denied because it is not correct that the Probate Court has exclusive jurisdiction in claims brought by an executor to establish liability in seeking to recover a debt or an asset due to the estate. The Probate Judge did, according to the record that has been stipulated into evidence here, stated on the record in the Probate proceedings that this action was authorized and if authorization is required, this was snfficient and the signing of an order to that effect would be purely an administerial act. On the claim of the Defendant that the Plaintiff is acting as agent for some of the heirs and that he has no capacity to sue the Defendants as heirs, this is something that is not correct. The Plaintiff is not suing the Defendants as heirs, but on the claim that they are indebted to or have property that belongs to the estate. It is the fiduciary's duty to collect and preserve the assets of the estate and this is true whether the obligation is sought against a person who happens to be an heir or against some totally different person. These are the reasons why the motions that have been filed are denied.

The Court was handed just before the session was to convene this afternoon a form of substitution of attorneys in which the firm of Casanova and Ryan is substituted as counsel for the Defendants in place of Wilfred Dupuis. Mr. Casanova and Mr. Ryan are present representing the Defendants, and Mr. Bordeau is present representing the Plaintiff. • • •

APPENDIX D — Pre-Trial Summary of Gogebic County Circuit Court Case Containing Stipulation of Counsel as to Probate Court Testimony

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF GOGEBIC

FIRST NATIONAL BANK AND TRUST COMPANY OF MARQUETTE, MICHIGAN, EXECUTOR OF THE ESTATE OF GEORGE ALBERT, DECEASED,
Plaintiff,

vs. File No. 72-38

SAMUEL G. ALBERT, M.D., and FRED G. ALBERT, D.P.M.,
Defendants.

PRE-TRIAL SUMMARY

At a session of said Court held in the Courthouse in the City of Bessemer, Michigan, on the 26th day of November, 1973.

PRESENT: HONORABLE WILLIAM F. HOOD, CIRCUIT JUDGE ON ASSIGNMENT

A Pre-Trial Conference was held in the above entitled matter. Plaintiffs were represented by Robert Bordeau of the law firm of Kendricks & Bordeau, Marquette, Michigan. Defendants were represented by Wilfred A. DuPuis of East Lansing, Michigan.

A Pre-Trial Conference was previously held before Honorable Donald L. Munro on the 30th of November, 1972 in which many items were covered and do not need to be restated here.

PLEADINGS

The Defendant, Fred G. Albert, desires to file a Counterclaim and will be given a period of fifteen days from this date in which to do so, and the Plaintiff will respond to the Counterclaim by filing an Answer or other appropriate response within ten days after receiving the Counterclaim. Other than this no further pleadings or amendments of pleadings are contemplated except that the parties intend to file the following motions.

Defendants desire to file a Motion for Accelarated Judgment or Summary Judgment on the ground that the Court lacks jurisdiction of the parties and subject matter and certain other grounds. The Defendants' motion and brief in support thereof are to be filed within thirty days of this date. Plaintiff's counsel will have twenty days in which to file an Answer to the motion and an answering brief. If the Defendants desire to file a reply brief, they will have an additional ten days in which to do so. The Plaintiff also desires to file a Motion for Summary Judgment or Accelerated Judgment. Such motion and a brief in support thereof will be filed within thirty days of this date, the Defendants having twenty days in which to file an Answer and brief, and the Plaintiff to have an additional ten days in the event a reply brief is desired. All of these motions will be regarded as submitted on briefs without oral argument.

WITNESSES AND EXHIBITS

The parties agree to exchange the names of witnesses and to exchange a list of proposed exhibits. It is very possible that counsel will stipulate to the admission of exhibits. If an exhibit is objected to by opposing counsel, counsel and the Court will be notified of the objection substantially in advance of trial. The exchange of witnesses and exhibits is to take place at least thirty days in advance of the trial. Both parties stipulate that the testimony of the Probate proceedings taken on February 16, 17 and 18, 1972, before Judge DeFant be evidence in this case. It is also agreed that the deposition of Dr. James

R. Acocks taken February 11, 1972 in the Probate Court proceedings be deemed evidence in this case.

TRIAL DATE

This matter is set for trial on Monday, March 4, 1974, beginning at 1:30 p.m. The entire week will be held available for the trial of this case and counsel should narrow the issues so that the trial can be expedited.

Dated at Manistique, Michigan, this the 26th day of November, 1973.

(s) William F. Hood
Circuit Judge by Assignment

Supreme Court, U. S.
FILED
JAN 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-851

SAMUEL G. ALBERT, M. D. and
FRED G. ALBERT, D.P.M.,

Petitioners,

v.

FIRST NATIONAL BANK AND TRUST
COMPANY OF MARQUETTE, MICHIGAN,
EXECUTOR OF THE ESTATE OF
GEORGE ALBERT, DECEASED,

Respondent.

REPLY BRIEF TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SAMUEL G. ALBERT, M.D.
FRED G. ALBERT, D.P.M.
In Pro Per
Albert Building
105 Suffolk Street
Ironwood, Michigan 49938
(906) 932-3406

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IN THE

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OCTOBER TERM, 1976

No. 76-851

SAMUEL G. ALBERT, M.D., and
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FIRST NATIONAL BANK AND TRUST
COMPANY OF MARQUETTE, MICHIGAN,
EXECUTOR OF THE ESTATE OF
GEORGE ALBERT, DECEASED,

Respondent.

REPLY BRIEF TO BRIEF OF RESPONDENT
IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI

Petitioners file this Reply Brief to the Brief filed by Respondent in Opposition to Petition for a Writ of Certiorari.

This Reply is made pursuant to and in compliance with Rule 24.4 of the Rules of the Supreme Court of the United States.

This Reply is deemed necessary by virtue of the deceptive and misleading contents of the Brief filed by the Respondent in Opposition to Petition for a Writ of Certiorari.

This Reply Brief is intended to be addressed to any Argument made by Respondent, wheresoever it appears in the Brief of Respondent, irrespective of its particular designated caption.

ARGUMENT

JURISDICTION

To Reply to what Respondent says under caption "Jurisdiction" (Resp. Brief p. 2) to the effect that jurisdictional requisites are not adequately set forth, Petitioners say that

compliance with Rule 23 appear from the Petition, pages 3 and 4, thereof.

The assertion of Respondent is oblivious of the very thrust of the Petition re: the matter of lack of jurisdiction emanating and evident in the inferior Courts, Probate Court, Circuit Court, Court of Appeals, and Supreme Court (State).

In any event, this Court percieves that if any inferior court has no jurisdiction of a cause, an appeal from its decision confers no jurisdiction on this Court of the merits, but the Court in such cases entertain an appeal for the purpose of revising a judgment or order for want of jurisdiction and this court is empowered to dismiss the case or direct its dismissal by the lower courts. It may also render a judgment for costs. This Court is not forclosed from assuming jurisdiction, in any event, to determine if the lower courts

had jurisdiction in the first instance. It is clear that this is provided by Article III, Paragraph 2, Clause 2 of the United States Constitution and under the authority of Mitchel v. Maurer, (Cal.) 55 S. Ct. 162, 293 U.S. 295, and Nashville, C & St. L. Ry. v. Wallace (Tenn.), 53 S. Ct. 345, 288 U.S. 249. The latter case, appropriately, noted that the Supreme Court will look to substance and not form.

STATEMENT OF FACTS

To reply and comment on Respondent's adoption of the facts of the case. This Court is told that Respondent accepts the Statement of Facts as noted in the decision of the Court of Appeals. (Appendix A of Petition, cited as 66 Mich. 252).

Petitioners state that for the purpose of determining whether a Writ of Certiorari issue the statement of facts elicited in the

Petition more fairly presents the facts without the facts being colored by extraneous matter which prefaces the facts with a statement of annoyance and cites other litigation. (See First Paragraph of Opinion of Court of Appeals, Appendix A of Petition). It is this opinion which is in issue ultimately. Petitioners seek a review of such opinion. This Petition contains facts from the record more amenable to a proper determination of the Petition. The statement of Petitioners stands as unrefuted. It is further contended that Respondent failing in the opportunity to refute, modify or amplify on the Petitioners facts has actually admitted that Petitioners statement is sufficient.

ARGUMENT

The Respondent asserts that jurisdiction was waived by Petitioners by not filing motion for accelerated judgment under GCR 116 and provides this court with the terms of the Court

Rule (Respondent's Appendix A). This attempt to delude and mislead the Court borders, if not actually constitutes, contumacious conduct. It is certainly consistent with the conduct complained of throughout. Counsel for Respondent knows that Petitioner filed Motions under GCR 116 (Accelerated Judgment) and GCR 117 (Summary Judgment) and that his motions received some consideration of the Circuit Court. Respondent's Appendix "D" indicates this fact. Additionally, the Circuit Court provided the guidelines and time limitations of said motions. This Court may note that Respondent's Appendix "C" not only proves that a Motion for Accelerated Judgment and Motion for Summary Judgment were filed on January 2, 1974, but the Circuit Court made a mere letter denial as petitioners are informed by Respondent's Appendix C. Petitioners had no knowledge of such letter. The Court awaited an opportunity to state reasons on the record. The Respondent lies

and attempts to delude by stating that the question of jurisdiction of the Circuit Court was never properly presented "below." Respondent, purposely, attempts to advise the Court that there was a waiver as to jurisdiction, well knowing the following facts:

(1) That the petition is not relegated to complaint over jurisdiction of person or property;

(2) That even if such waiver of complaint over jurisdiction of person or property existed as under GCR 116.2, such waiver is set aside by the Pre-Trial Summary (Respondent's Appendix D);

(3) That, in fact, Petitioners did file the Motion for Accelerated Judgment on January 2, 1974;

(4) That, in fact, the motion contained all of the jurisdictional objections: re: cause, subject matter (GCR 116.1(2); lack of capacity to sue (GCR 116.1(3); and other disability of suing party (GCR 116.1(5);

(5) That, in fact, the subject matter jurisdiction was presented and ruled upon as indicated by Respondent's Appendix C.

Respondent says on Page 2 of its Brief:

> "Under Michigan law, objection to jurisdiction is waived unless made in the responsive pleading on motion first filed GCR 1963, 116."

The Respondent continues to state that at no time did Petitioners "allege lack of jurisdiction in their Answer to the Circuit Court Complaint (Respondent's Appendix B).

In the first place, Respondent refuses to advise the Court, as clearly indicated in GCR 116.2, that the waiver, if any, of the defense of lack of jurisdiction as described by Respondent is jurisdiction "over the person or property." Respondent simply refers to "jurisdiction" intending to convince this Court by the general term "jurisdiction" that all defenses to or objections to jurisdiction were included in GCR 116.2 and more importantly, that Petitioner was subject to the waiver provisions improperly cited.

To support an argument of waiver, Respondent believes that the failure of Petitioners attorneys to incorporate an allegation of objection to jurisdiction in their answer, forecloses any subsequent allowance of interposing such objections by further pleadings, as motions, permitted by Pre-Trial Summary (Respondent's Brief, Appendix D, Page 15, under caption of "Pleadings"). GCR 1963, 301 grants the Court authority to amplify the pleading and to permit other motions to be disposed of before trial during a pre-trial conference.

The statement that the Complaints re: conversion and breach of fiduciary duty were properly brought by the Respondent does not reflect the law. This matter of capacity to sue is covered by Petitioners in subparagraph C of the Petition under Reasons for Granting Writ, pages 24-42. The Respondent had no discretion to exercise. The powers of an

executor are statutorily limited. The only provision provided by law for an executor to proceed in the matter of "conversion" is found and limited to Compiled Laws Supp. 1956, Sec. 705.5, MSA 27.3178(385). (Petition, pages 25, 26, and 29). Likewise, the Probate Court was limited to that procedure. The Respondent did not use the provided procedure. (Petition, page 25) and the Probate Court did not recognize the request for instructions by the executor as a complaint under the above quoted statute (Petition, pages 25-26).

Respondent wrongfully contends that no order was necessary for it to institute suit. This is the position the Respondent must take because there was no such Order. Also, it attempts to reconcile its promise on the record to prepare for entry an order for the Court's signature. (See Petition, page 40). All that is argued as reason for granting Writ

found on Pages 18-42, is applicable and provides adequate reply by reference.

The Respondent obtained the so-called instruction to proceed against Petitioners from determinations made by the Probate Judge who was biased and prejudiced and who did not provide Petitioners with a fair hearing.

Petitioner details showing of preservation of grounds:

A. Petitioners insisted upon a motion for Accelerated Judgment (GCR 116) at Pre-Trial Conference and as alluded to in Pre-Trial Order Summary (Appendix D, page 15 of Respondent's Brief in Opposition) on the grounds "that the Court (Circuit) lacks jurisdiction of the parties and subject matter and certain other grounds . . ." (Petitioners relied on the presentation of said motions and did not attend the in-chambers pre-trial conference).

B. Petitioners continued to insist on a motion for summary judgment because of the conclusionary nature of the Complaint, and Petitioners filed same in pro per on January 2, 1974, before trial, and on the same date, and in pro per (indicates petitioners insistance) filed a Motion for Accelerated Judgment and applied and preserved jurisdictional grounds relating to the jurisdiction of the Circuit Court. (Respondent Appendix C - Opinion of Gogebic County Circuit Court, pages 12-13).

C. The Circuit Court alludes to and makes a determination of the jurisdictional issue regarding the lack of a judgment and order in writing necessary to confer jurisdiction on the Circuit Court or the right of the executor to proceed without proper authority through Order of Judgment and/or capacity to sue. (Respondent's Appendix C, page 13).

D. The Circuit Court admits by confession in Appendix C - Opinion of Gogebic County Circuit Court, page 12, that Petitioners motions filed January 2, 1974, were determined to be denied without hearing and they had no knowledge of same until date of proceedings held on March 4, 1974. The Court in Appendix C, says:

> "There were three motions filed in this case and the Court has indicated by letter to counsel that all such motions would be denied and the letter stated that counsel would be informed of the reasons for such denial at the opening of the trial here today, the reasons to be stated on the record."

This is additional proof of the preservation of the issue.

E. The trial proceeded without entry of an Order of Denial of Petitioners Motions. Here the Court was not speaking through an Order or Judgment, but impermissably through a letter and an Opinion without argument.

F. That the proceedings of the Probate

Court showing patently on its face together with a noticed failure of Respondent to file and enter the prerequisite order were stipulated as a part of the record of the Circuit Court further evidences the preservation of the issue of jurisdiction. (Petitioners Appendix A, Findings of Fact and Conclusions of Law of the Circuit Court and Respondent's Appendix C, page 13).

G. Petitioners insistance that their Counsel reflect and preserve their jurisdictional and relate due process claims is evidenced in the Court of Appeals on Application for Rehearing after withdrawal of Petitioners' counsel and is contained in the filed and recorded correspondence between petitioners and their counsel and is a part of the record.

Petitioner says that the decisions rendered in the lower courts do not rest on

independent and adequate state grounds. The principle that this Court will decline to review in such cases does not apply because Petitioners contend that jurisdiction is lacking and that all that was undertaken and determined by the lower courts is a nullity.

The question of jurisdiction of the subject matter may be raised for the first time in the Supreme Court, or the Court may on its own motion, take notice of such want of jurisdiction. This Court takes notice of the want of jurisdiction when, as in the instant case, it is apparent on the face of the record. Twist v. Prairie Oil & Gas Co., Okl., 47 S. Ct. 755, 274 U.S. 684, U.S. v. Corrick, Ill., 56 S. Ct. 829, 298 U.S. 435; rehearing denied 56 S. Ct. 951, 298 U.S. 692.

It appears that Respondent's opposition is based on a procedural default of Petitioner because Petitioner failed to make a motion for

accelerated judgment under GCR 116 and by failing to preserve the federal grounds. Of course, Petitioners deny same. It appears that Respondent has cited Henry v. State of Mississippi, 379 U.S. 443, 85 S. Ct. 564, 567 (1965 without reading and/or properly interpreting plain words. The decisions of Henry is favorable to the contentions of Petitioner. Since the claim of Respondent relates to a default in compliance with a state procedural rule, Henry supports Petitioner in stating that the question of when and how defaults can preclude this Court's consideration of a federal question is itself a federal question. The Respondent does not distinguish between state substantive grounds and state procedural grounds. There is no state interest involved here. Such being the case, the state procedural rule, even if it applied, ought not be permitted to bar vindication of important federal rights.

Respondent has cited Black v. Cutter Laboratories, 351 U.S. 292, 100 L ed 1188, 76 S. Ct. 82.4, reh. den. 352 U.S. 859, 100 L ed 2d 69, 77 S. Ct. 21, but fails to apprise that a writ of certiorari was granted originally in 350 U.S. 816, 76 S. Ct. 51. True upon review after grant of certiorari the writ was dismissed by a divided court. Justice Douglas in dissent, joined by the Chief Justice and Justice Black, said:

> "I believe with all deference, that the decision of the Court (dismissing the Writ) abuses the rule that we will not undertake to review a decision of the State Court that rests on an independent state ground. No independent state ground is presented in this case...."

In the case of Jenkins v. Florida (1974) 96 S. Ct. 2750, 417 U.S. 815, where the question of the protection of rights under the 14th Amendment was involved which the appellee said was not before this Court because appellant did not raise it on his State Appeal.

BEST COPY AVAILABLE

This Court on that issue said, page 2753:

> "But whether or not appellant argued his constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it ... That is sufficient under our practice."

The Court of Appeals after considering Petitioners' application in pro per for rehearing containing the constitutional issues and lack of jurisdiction contentions stated that it gave the application "due consideration."

There can be no question as to the proper presentation of a federal claim when the highest state court pases on it. In this case, the matter of jurisdiction was presented below, the federal questions were presented and considered thus Petitioners have satisfied the statutory requirement that the federal right sought to be vindicated in this Court be one claimed below 28 USC Sec. 1257(3).

CONCLUSION

This Court should grant a Writ of Certiorari and assume jurisdiction to determine the want of jurisdiction as same appears on the face of the records of the lower courts. This jurisdictional matter has not been waived. The record of the Circuit Court is a nullity. The Petitioner could not waive subject matter jurisdiction. The Circuit Court could not by judicial fiat or otherwise create its own jurisdiction. Any judgment by a court acting without jurisdiction is a nullity and may be so treated everywhere.

Respectfully submitted,

SAMUEL G. ALBERT, M.D.

FRED G. ALBERT, D.P.M.

Petitioners in Pro Per
Albert Building
105 Suffolk Street
Ironwood, Michigan 49938
(906) 932-3406

PROOF OF SERVICE

STATE OF MICHIGAN
SS.
COUNTY OF GOGEBIC

SAMUEL G. ALBERT, M.D., first being duly sworn, deposes and says that he is one of the petitioners, herein, and does certify that three (3) true and exact copies of the within and foregoing Reply Brief to Brief of Respondent in Opposition to Petition for a Writ of Certiorari, was served upon opposing counsel by placing same in the United States Mail with sufficient postage to insure delivery to STEPHEN F. ADAMINI, Esquire, 128 West Spring Street, Marquette, Michigan, 49855, Attorney for the Respondent.

Dated this 23 day of January, 1977.

Samuel G. Albert M.D.
SAMUEL G. ALBERT, M.D.

Subscribed and sworn to before me this 23rd day of January, 1977.

Bette J. Beber

Bette J. Beber
Notary Public, Gogebic County, Michigan.
My commission expires 1-8-1980.